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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-628

ALLENBERG COTTON COMPANY, INC.,
Appellant,

v.

BEN E. PITTMAN,
Appellee.

On Appeal from the
Supreme Court of Mississippi

JURISDICTIONAL STATEMENT

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IN THE

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October Term, 1973

No. _____

ALLENBERG COTTON COMPANY, INC.,
Appellant

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BEN E. PITTMAN,
Appellee

On Appeal from the Supreme Court of Mississippi

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Supreme Court of Mississippi is set forth in the Appendix, infra pp. A. 1-A. 7, and is reported at 276 So. 2d 678 (1973).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1157 (2), this being an appeal which draws into

question the validity of Miss. Code 1942 Ann. §5309-239 (Supp. 1972) infra, p. 2, as applied to the facts of this case by the Mississippi Supreme Court, on the ground that as applied it is repugnant to the commerce clause of the Constitution of the United States.

Appellant sued in the Chancery Court of Quitman County, Mississippi to enforce its rights under a contract to buy cotton from appellee. The Chancery Court found a breach of contract to deliver cotton by appellee and awarded damages of $18,156.00 and costs. The Supreme Court of Mississippi reversed and dismissed appellant's suit. On May 14, 1973 a Petition for Rehearing was denied. Timely notice of appeal to this Court was filed in the Supreme Court of Mississippi on August 8, 1973. An extension of time in which to docket this appeal was granted by the United States Supreme Court on August 7, 1973 to and including October 11, 1973. As the Supreme Court of Mississippi explicitly decided that appellant's contract and activities were not in interstate commerce within the protection of the commerce clause of the United States Constitution, this matter is appropriately brought to this Court by appeal.

In the event the Court does not consider appeal the proper mode of review, appellant requests the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. §2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the commerce clause of the Constitution of the United States, U. S. Const. Art. I, §8, Cl. 3.

This case also involves Miss. Code 1949 Ann. §5309-239 (Supp. 1972) which states, in relevant part:

> No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state. Nor shall any action, suit or proceeding be maintained in any court of this state by any successor or assignee of such corporation on any right, claim or demand arising out of the transaction of business by such corporation in this state.

QUESTION PRESENTED

Can the Mississippi courts absolutely ignore controlling constitutional precedent, *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 882 (1921), and bar a foreign corporation from enforcing its contracts for the purchase of raw agricultural products in Mississippi?

STATEMENT[1]

In this case the Mississippi Supreme Court ignored a United States Supreme Court decision on all fours, *Dahnke-Walker Milling Co. v. Bondurant*, *supra*. As a direct result of this decision, cotton farmers in Mississippi are today repudiating their contracts for the sale of cotton on a scale which is massive and unprecedented in the history of the United States. Cotton merchants have purchased over 70% of the 1.6 million bales of cotton expected to be produced in Mississippi in 1973, and they have resold the overwhelming majority of it at lower than current prices to foreign and domestic buyers. In the six months preced-

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[1] Page references in the record are to testimony received in a companion case (Allenberg vs. H. T. Pittman, No. 7643). By stipulation and agreement the facts in the companion case are adopted in the instant case (R. 119, 120).

ing this writing the price of cotton has climbed 250%. Farmer repudiations in Mississippi alone can bankrupt the entire cotton merchandising industry.

Put in simplest terms, this appeal asks for an immediate reaffirmance of the principle that no state may raise artificial barriers to the purchase of its raw agricultural products for shipment in interstate commerce.

Appellant, Allenberg Cotton Company, Inc., a Tennessee corporation, based in Memphis, Tennessee, arranged with one Covington, a cotton buyer located in Marks, Mississippi, to elicit offers for the sale of cotton from cotton farmers in the area around Marks (R. 48, 65, 66). Covington had performed this service for another cotton merchant in past years, but in 1971, the year of the subject contract, Covington, for reasons of his own, acted only for Allenberg, although he was not restricted to Allenberg by any agreement (R. 50, 52, 69). Under his arrangement with Allenberg, Covington would discuss with a local farmer the number of acres of cotton the farmer might be willing to sell, the price at which he would be willing to sell, and the gin to be used (R. 54, 55). Covington had no authority from Allenberg other than authority to elicit offers to sell (R. 60, 61, 65, 66). Covington would then telephone the Allenberg office in Memphis, Tennessee, and tender the terms of the farmer's offer to sell (R. 54, 67). Covington had no authority to enter into a crop purchase contract (R. 74). If the Allenberg office in Memphis accepted the farmer's offer to sell, a written contract would be signed in Memphis by Allenberg, and mailed to Covington, who would then have the farmer sign the contract (R. 57, 63). The Pittman contract here involved was handled in the normal manner as indicated above, except that it was delivered by an official of Allenberg from Memphis to Marks (R. 56). Under the terms of the con-

tract, after harvesting the cotton, Pittman was to have his cotton ginned and stored at a cotton compress (R. 7, 8). Samples of the cotton were to be sent to the U. S. Department of Agriculture for classification and to Allenberg's office in Memphis (R. 7, 8). To obtain payment Pittman was to deliver the classification documents and warehouse receipts to Allenberg or Covington (R. 7, 8). Memphis Cotton Exchange Rules governed the contract (R. 7, 8).

These same procedures are used by Allenberg throughout the Cotton Belt, including Mississippi, Arkansas, Missouri, Tennessee, Louisiana, California, Arizona and Texas (R. 70-78).

The cotton bought by Allenberg in Mississippi, including Pittman's cotton, was all purchased for shipment outside Mississippi (R. 60, 80, 99). The Pittman cotton was to be temporarily stored at a Mississippi warehouse designated in the contract pending its shipment to a customer of Allenberg outside of Mississippi (R. 60, 80, 99). *All* of the cotton purchased by Allenberg in Mississippi in the 1971 crop year was shipped by interstate carrier outside the state of Mississippi[2] (R. 73, 74). At the time of the Pittman purchase, Allenberg was already obligated to customers outside the state of Mississippi to sell them cotton (R. 63). The Pittman cotton was purchased for the purpose of satisfying part of this obligation (R. 63).

The Pittman contract was entered into January 28, 1971 (R. 7, 8). At harvest time on November 9, 1971, the Pittman cotton was worth $18,156.00 more than the contract

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[2] Virtually all of the 1,693,000 bales of cotton grown in Mississippi in 1971 were shipped out of the state because there is no significant amount of milling of cotton performed in Mississippi. U.S. Department of Agriculture, **Supp. for 1972 to Bulletin No. 417-Statistics on Cotton and Related Data 1930-1967**, pp. 58 and 77.

price, and Pittman refused to deliver the cotton to Allenberg (R. 121, 122). Allenberg sued in the Chancery Court of Quitman County, Mississippi, to enforce its rights under the contract. The Chancery Court found a breach of contract by Pittman and awarded damages to Allenberg of $18,156.00 and costs (R. 126a). On direct appeal to the Supreme Court of Mississippi, that court reversed and dismissed the case, holding that Allenberg was a foreign corporation transacting business within Mississippi without a certificate of authority, and that Miss. Code 1942 Ann. §5309-239 (Supp. 1972) barred Allenberg from maintaining suit in the courts of Mississippi.

The following material on trade procedure in marketing cotton is included to show the industry context of this case and to explain the cotton merchant's function in directing cotton through the channels of interstate commerce.[3]

One of the primary functions of the cotton merchant is to assemble from all parts of the United States Cotton Belt and elsewhere in the world quantities of "even-running cotton":

> Each of the thousands of mills manufacturing cotton throughout the world specializes by necessity in a narrow range of products, and each requires specific qualities of "even-running" cotton for efficient operation.
>
> Raw cotton is produced on millions of farms; and on most of these farms each bale is of a different quality due to variations in soil, time of planting, harvesting, changes in weather, variety of cotton planted, and many other causes. A vital function then of cotton merchandisers is to assemble these odd-lot bales and pool them with other bales of like qualities to make up "even-

[3]The Court is requested to take judicial notice of the following materials. F.R.E. Rule 201.

running" lots to meet the requirements of spinners wherever they are. Strange as it may seem the three or four bales grown by any one farmer may need to be, and sometimes are, actually sent to different parts of the world in order that each bale may find its best market and most efficient use. It is thus quite possible that a bale of cotton grown near a cotton mill in Texas will find its most economical use in a mill deep in France, or even a mill on the banks of the Ganges River in India alongside another cotton field; and a bale grown in India, because of its wooly nature, may be sent to the United States to be mixed with wool in making blankets and rugs.[4]

Making yarn out of raw cotton is highly technical and requires the use of several different machines. There are six distinct processes in making yarn, usually spoken of as spinning, as follows: (1) mixing, (2) opening, (3) beating, (4) carding, (5) drawing and (6) spinning.

Every cotton spinning mill is equipped to balance on a specific quality of cotton . . . A mill equipped to balance on Strict Middling cotton would not clean Strict Low Middling fast enough to keep the second set of equipment busy. Moreover, rolls set to draw 7/8 inch cotton could not handle 1-1/16 inch without substantial adjustments. These facts alone justify the spinning mill's insistence on delivery of the exact quality of cotton it buys.[5]

* * *

Reasons for mill insistence on uniformity of staple length in cotton are made manifest at this point in the

[4]A. B. Cox, **Cotton-Demand, Supply & Marketing** (Hemphill, Austin, Texas 1953), PP. 4-5.

[5]A. B. Cox, Supra, n. 4, p. 49.

manufacturing process. If some of the cotton is long staple and some short and the mill operator sets his rolls to clear the long fibers, the short ones are not drawn and tend to fall down between the rolls and cause much waste. If the rolls are spaced for the short fibers, the long ones are caught by two pairs of rollers and are stretched or broken; the result is ragged, buckled yarn. In no case is it possible to make smooth yarn economically with such staple mixtures.[6]

Because of the needs of the textile industry as described above, cotton bought in various places of the world is grouped together by merchants, such as Allenberg, into even-running lots before delivery to the mills which are its customers. This grouping is done by the merchant's experts on the basis of the government classification of the cotton, and on the basis of the samples delivered to Allenberg's Memphis office.

The commodity traded in spinners' markets is not just cotton. It is even-running quality cotton usually in minimum lots of 100 bales, and not infrequently the contract may be for thousands of bales. A lot is even-running when qualities that are measurable are alike in each bale: the grade is the same, the staple length is the same and the color is the same.[7]

While the cotton is being classed and assembled into even-running lots on the basis of the samples, the bale itself remains in the warehouse to which it was delivered by the farmer because it is unnecessary and uneconomical to ship the actual bale to Memphis.

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[6] A. B. Cox, Supra, n. 4, pp. 50-51.

[7] A. B. Cox, Supra, n. 4, p. 168.

Cotton concentration is a major service performed in cotton marketing. Farmers start the job of assembling cotton when they haul it to the gins and local markets to be made into bales and sold. It is bought and handled in farmers' markets in what is known as "Odd Lots", in units most often of one to a few bales at a time. Farmers aid in concentration but what they do is not a part of concentration as the term is used in cotton marketing. Concentration means specifically the assembling of "Odd lot" cotton into even-running lots in warehouses selected by cotton merchants for the purpose. These warehouses are located in towns and cities best situated to serve important areas of cotton production, or strategically located with reference to the market for the cotton of the area. These cities, properly equipped with transportation and communication facilities and with warehouse space and compresses, have come to be known as cotton concentration points.

The managerial work of cotton concentration takes place in the merchant's office. The classing department determines the class of each bale bought. Cards are made out for each bale showing in detail the qualities of each bale, its mark, origin, weight, location, price, etc. The cards then become the means of making up even-running qualities and of picking out bales to ship. The facts for cotton concentration for cotton marketing operations are on these records in the merchant's office. Even-running lots to ship to a mill are thus made up in the merchant's office and not by warehousemen.

The actual picking out of the bales of cotton, tagging and marketing them for shipment, loading the bales into

cars and taking out the bill of lading are functions performed by warehousemen at the direction of the cotton merchant.[8]

Because the price of cotton is subject to great fluctuations, all those who handle the commodity in large quantities must protect themselves from rapid price changes by either assuring an actual market for the cotton held by them, or by use of the future exchange. In the Pittman case, Allenberg had already assured itself of a market by advance sales at the time it contracted to buy the cotton in Mississippi.[9]

Where the merchant does not already have a customer to buy the cotton, cotton bought by the merchant is, by normal industry practice, hedged by offsetting sales on the New York Cotton Exchange.[10] The economic function of the futures market is well known and needs no lengthy explanation here.[11]

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[8] A. B. Cox, Supra, n. 4, pp. 233-234.

[9] For an explanation of this practice see first example, Infra, n. 9.

[10] This practice is described in several textbooks, see A. B. Cox, Supra, n. 3, p. 259 et seq; A. H. Garside, **Cotton Goes to Market** (Fredrick Stokes Co., New York, 1935) p. 206 et seq; T. S. Miller, **The American Cotton System** (Austin, Tex. 1909) p. 102 et seq.

[11] "It is the function of the commodity futures market to eliminate or reduce the risk of price fluctuations in the process by which a commodity moves from grower to consumer. The method whereby this is accomplished using the cotton business as an example, is as follows: Contracts on the exchange call for the purchase or sale of cotton for future delivery during a specified month from one to eighteen months from the date the contract is made. A person engaged in the production, manufacture or sale of cotton may take a position on the exchange by buying or selling cotton for future delivery to offset his purchase or commitments in the actual commodity and thus hedge (insure) against price fluctuations. This can be illustrated by the example of a merchant who sells spot cotton for delivery to a mill six months from now at a fixed price which gives him a fixed profit based upon current spot prices. He does not now have the cotton

(Continued on following page)

It is sufficient to point out that any merchant who contracts to buy cotton from a farmer should either assure itself of a market by resale to a mill, or should make offsetting sales (hedges) on the cotton exchanges.[12] In either case there is immediate and direct reliance on the validity and enforceability of the cotton purchase contract entered into between the merchant and the farmer. If the contract with the farmer cannot be enforced, the merchant is no longer hedging within the meaning of the Commodity Exchange Act,[13] but becomes an unintended speculator subject to enormous loss if the price of cotton goes up, because the merchant must replace the cotton it has sold

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(Continued from preceding page)

and therefore takes the risk of a change in the spot price when he is to acquire it to fulfill his commitment to deliver. To guard against this risk of a change in price, he takes a long position on the futures market of an equivalent amount of cotton (i.e., he makes a contract to purchase cotton for future delivery on the exchange). If the price of spot cotton increases during the six-month period, the price of futures will tend to increase correspondingly and the loss he sustains in having to pay a higher price for spot cotton will be offset by the gain in price on the futures market when he closes out his futures contract at a profit. In another case, the merchant purchases cotton for inventory from a farmer at a fixed price. To avoid the risk of a change in price when he is ready to sell it, he takes a short position on the futures market (i.e., he makes a contract to sell cotton for future delivery on the exchange). If the price of spot cotton decreases the price of futures will tend to decrease correspondingly and the loss he sustains in the value of his inventory will be offset by his gain on the futures market when he closes out his futures contract at a profit . . . The futures exchange is used by those who grow, manufacture, process, sell and utilize cotton and cotton products and wish to hedge against price fluctuations." **Volkart Brothers, Inc. v. Freeman**, 311 F.2d 52 (5th Cir. 1962) pp. 54-55.

[12] The New York Cotton Exchange is a designated contract market under the Commodity Exchange Act. Act of September 21, 1922, c. 369, 42 Stat. 998, as amended by Act of June 15, 1936, c. 545, 49 Stat. 1941, as amended, 7 U.S.C.A. Sec. 1 et seq.

[13] "Bona fide hedging transactions shall mean sales of any commodity for future delivery on or subject to the rules of any board of trade to the extent that such sales are offset in quantity by the ownership and purchase of the same cash commodity or conversely, purchases of any commodity for future delivery on or subject to the rules of any board of trade to the extent that such purchases are offset by sales of the same cash commodity." Commodity Exchange Act, Supra, n. 9, § 6a (3).

to its customer, or sold on the cotton exchange, by buying replacement cotton at the higher market price. If these losses exceed the merchant's capital, defaults will result in the contracts on the exchange or with the mills.[14] The integrity of the merchant's contract with the initial source of supply, the farmer, is thus the foundation of the entire commodity merchandising system.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Prior to trial, Pittman filed an "Answer to [Allenberg's] Amended Bill of Complaint and Decree of Discovery" (R. 17, 18) setting forth as an affirmative defense that Allenberg was "a foreign corporation doing business in the State of Mississippi and it is not qualified to do business in the State of Mississippi as required by § 5309-221 of the Mississippi Code of 1942 Annotated." (R. 18).

After hearing evidence on the circumstances concerning the making of the crop purchase contract and Allenberg's

[14] Bank financing of the cotton merchant may allow the merchant to borrow up to 90% of the price of the raw cotton, because the bank, too, relies on the sale of futures against the purchase of cotton from the farmers to protect the merchant from market risks due to price fluctuations. This allows the cotton merchant to handle a large quantity of cotton on a relatively small amount of capital. A. B. Cox, Supra, n. 4, p. 181. In a year of violent price change such as the current year, 1973, the merchant will find that if it cannot enforce its contracts with the farmer, it must replace the cotton sold to mills or on the exchanges after prices have more than doubled. For example, assume that the price of a standard grade of cotton was 30¢ per pound on February 1, 1973. The merchant contracting to buy cotton from a farmer on that date might have made a sale to a mill at 33¢ which assured him of a 3¢ per pound gross profit. However, if in September 1973, the merchant finds that it cannot enforce its contract with the farmer, and the price of cotton is then 85¢ per pound, the merchant's potential loss is so huge it threatens the entire system because it can far outstrip the merchant's capital. Replacement of only 100,000 bales of cotton at that market difference would produce a $26 million loss. A large proportion of the nation's cotton is handled through merchants in Memphis, Tennessee. U. S. Department of Agriculture, **Cotton Situation** CS-253 (Oct. 1971) p. 13. The 1971 cotton crop in Mississippi alone was 1,693,000 bales. Infra. n. 2, p. 13.

activities in Mississippi, and after argument by the parties, the Chancery Court of Quitman County entered a decree that Allenberg was not doing business within the State of Mississippi under § 5309-239 of the Mississippi Code of 1942 (R. 114a).

§ 5309-221 of the Mississippi Code of 1942 is a companion to § 5309-239 and contains a listing of activities which are not "transacting business" under § 5309-239. § 5309-221 provides, inter alia, that "a foreign corporation shall not be considered to be transacting business in this state, for the purposes of this Act, by reason of carrying on in this state any one or more of the following activities: . . . (e) transacting any business in interstate commerce." By its terms the Mississippi statute is coterminous with the Commerce Clause of the Constitution.

On appeal, the Supreme Court of Mississippi reversed, stating: "Nor is the transaction converted into interstate commerce because, after the cotton had been delivered to Allenberg at the warehouse in Marks and title thereto had become vested in Allenberg in Mississippi, Allenberg, at its own election and for its own purposes, might, afterward sell it in interstate commerce." Opinion of the Mississippi Supreme Court, infra, appendix p. A. 1. This was a flat rejection of Allenberg's contention that its activities were in interstate commerce.

A timely petition for rehearing was denied by the Mississippi Supreme Court on May 14, 1973.

By certificate from the Supreme Court of Mississippi, Appendix, infra pp. A. 12-A. 13, it is established that:

> In this appeal from the Chancery Court of Quitman County, and in the arguments both oral and by brief made in this court on behalf of the appellee [Allenberg]

on the original appeal and the petition of appellee for rehearing and brief filed in support thereof, it was insisted by appellee that under the facts of this case, the contract sued upon by the appellee was made in interstate commerce and that it was transacting business in interstate commerce, and thus entitled to protection as such under the applicable statutes of Mississippi and the Commerce Clause of the Federal Constitution; and that in its deliberation of this case, this Court both on the original appeal and the petition of rehearing considered these questions of interstate commerce; and it was the judgment of this Court that said contract was not made in interstate commerce, nor that the facts of the case showed appellee to be transacting business in interstate commerce within the meaning of the laws of Mississippi and that Mississippi Code 1942 Ann. Section 5309-239 (Supp. 1972) as applied by this Court in this case to the Allenberg Cotton Company, Inc., a Tennessee corporation, to bar it from maintaining suit in the courts of this state was not repugnant to the Commerce Clause of the United States Constitution; and it was necessary to the Court's judgment in said case to determine said questions raised as to interstate commerce, and that such questions were determined adversely to the position of appellee.

The Certificate is "clear and decisive in stating whether a Federal question, and if so, what Federal question, was decided as a necessary ground for reaching the judgment under review."[15]

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[15] **Herb v. Pitcairn**, 324 U.S. 117, 128. (1945) **Whitney v. California**, 274 U.S. 357 (1927).

THE FEDERAL QUESTION IS SUBSTANTIAL

The issue raised in this appeal is of importance to the cotton industry, and it is of importance to the merchandising of all raw agricultural commodities in the United States. If merchants who serve national and international markets by purchasing farm products such as cotton, wheat, soybeans, cattle, corn, oats, hogs, sugar or any raw agricultural commodity throughout the nation, must qualify to do business in every state where purchases are made, then the goal of free trade among the states will have been abandoned. If present contracts are not enforceable, enormous economic dislocations may occur immediately.

The decision in this case will have a profound effect on the continuation of the practice of advance or forward contracting between agricultural merchants and cotton farmers. Although this practice has become widespread only in the very recent past, it is now of vital importance. In 1973 farmers have forward contracted 45% of the entire United States upland[16] cotton crop, as compared with 32% in 1972,[17] and only 11% in 1970.[18]

The practice of advance contracting replaces United States government advance payments and price supports with the financing available from commercial sources based on the agricultural merchant's fixed price purchase contract. The advance purchase contract makes it pos-

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[16] "Upland cotton" is also called "American cotton." The term upland cotton means cotton grown in the southeastern United States. **Dictionary of the English Language** (Random House, Unabridged 1966) p. 1570. The 1973 United States cotton crop is expected to be 12,740,000 bales of which 12,648,000 bales is upland. U. S. Department of Agriculture, **August 1 Crop Report** (August 9, 1973) p. 2.

[17] **August 1 Crop Report**, supra n. 16, pp. 2 and 12.

[18] U. S. Department of Agriculture, **Cotton Situation**, CS-253 (Oct. 1971) p. 12.

sible for the farmer to fix the return on his expected investment *before* he plants his crop. As the practice becomes widespread it replaces government price supports because the forces of supply and demand at the beginning of the crop year will determine whether or not the farmer plants, and if so, how much. In contrast, the traditional method of marketing assures the farmer no return on investment and boom and bust cycles are prevented only by government intervention in the market.

If the out-of-state merchant cannot enforce his advance purchase contract with the farmer, that merchant will withdraw from competition for the farmer's crop.[19] This is directly contrary to the open economy which the commerce clause was intended to produce.[20]

A. THE ISSUE UNDER THE COMMERCE CLAUSE

A state cannot condition the right of a foreign corporation to sue upon a contract for the interstate purchase of goods.[21]

The question in this appeal is whether or not Allenberg's purchase of cotton for shipment outside Mississippi was an activity which the State of Mississippi could condition by requiring that Allenberg first qualify to do business in Mississippi.

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[19] In the past there has been no problem with the enforcement of cotton purchase contracts by foreign corporations because physical delivery of warehouse receipts was made contemporaneously with the contract of sale. Under the old system, of course, sales will not be made until after the crop is harvested.

[20] See **The Federalist Nos. 7, 22** (Hamilton), No. 42 (Madison); Brown, **The Open Economy: Justice Frankfurter and the Position of the Judiciary**, 67 Yale L. J. 219, 229 (1965).

[21] **Dahnke-Walker Milling Co. v. Bondurant**, 257 U.S. 882 (1921); **International Textbook Co. v. Pigg**, 217 U.S. 91 (1910).

B. ALLENBERG'S ACTIVITIES WERE PROTECTED BY THE COMMERCE CLAUSE FROM THE BURDENS IMPOSED BY MISSISSIPPI

It is the contention of Allenberg that this case is controlled by *Dahnke-Walker Milling Co.*[22] which held that where raw agricultural goods are purchased in one state for shipment to another, the purchase contract is protected by the commerce clause, and the purchaser may not be required to qualify in order to sue on the purchase contract.

In *Dahnke*, a Kentucky farmer contracted with another resident of Kentucky, one John Creed, to sell his wheat crop, estimated at 14,000 bushels. Creed was the agent of Dahnke-Walker Milling Co., a Tennessee corporation. The farmer testified that he was not told that Creed was an agent for anyone and Creed disputed this. The factual difference was never resolved, the state court expressly determined that its decision would be the same in either case, and the United States Supreme Court apparently came to the same conclusion because it did not mention the conflict. Under the contract, the buyer was free to consign the wheat to such destination as it saw fit. There was no contract stipulation that the wheat was to be shipped out of the state. Delivery of the wheat and payment were both to be performed in Kentucky. The purchase by the Tennessee corporation was not an isolated transaction because the corporation had purchased other quantities of wheat in Kentucky at other times. The Tennessee corporation sued in the Kentucky courts, and the farmer defended on the basis that the corporation had failed to qualify to do business in Kentucky. The Kentucky Supreme Court

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[22] Supra, n. 21, hereinafter **Dahnke**.

agreed with the farmer, held that the transaction was not in interstate commerce and denied the Tennessee corporation access to the Kentucky courts.[23]

On appeal, the United States Supreme Court reversed and held that as the state court applied the state statute to the plaintiff Tennessee corporation, the statute was repugnant to the commerce clause of the Constitution and was void. The Court stated that:

> Where goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination, and while they are in the original packages. [citations omitted] On the same principle, ***where goods are purchased in one state for transportation to another, the commerce includes the purchase*** quite as much as it does the transportation.
>
> * * *
>
> A corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause.[24]

The *Dahnke* decision establishes that the activities of Allenberg in buying cotton in Mississippi were commerce;

[23] **Bondurant v. Dahnke-Walker Milling Co.**, 195 S.W. 139 (Ken. 1917), affirmed after retrial, 215 S.W. 76 (Ken. 1918). The above summary of facts is drawn both from the state court opinion and the opinion of the United States Supreme Court cited in note 22, **supra.**

[24] **Dahnke**, Supra, n. 21, pp. 290-291 (emphasis added).

that commerce was interstate; and a state statute barring Allenberg from enforcing its purchase contract unless it qualifies in Mississippi is a burden on that interstate commerce which is repugnant to the commerce clause and void.

The decision in *Dahnke* has been followed in cases too numerous to list here, and it is one of the cornerstones of American law.[25] The principle of free access to the products of the land is central to the founders' intent that the states' respective products would be freely interchanged.[26]

> The material success that has come to inhabitants of the states which make up this federal free trade unit has been the most impressive in the history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions. We need only consider the consequences if each of the few states that produce copper, lead, high-grade iron ore, timber, cotton, oil or gas should decree that industries located in that state shall have priority.
>
> Our system, fostered by the Commerce Clause is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation . . . Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.[27]

[25] **Shepard's United States Citations** lists 461 citations of Dahnke.

[26] Infra, n. 27, and Supra, n. 20.

[27] **H. P. Hood & Sons v. DuMond**, 336 U.S. 525 (1949).

In *Shafer v. Farmer's Grain Company*,[28] this Court struck down a North Dakota statute imposing licensing and other requirements on buyers of grain in North Dakota saying:

> Buying for shipment, and shipping, to markets in other states, when conducted as before shown, constitutes interstate commerce,—*the buying being as much a part of it as the shipping*. We so held in Lemke v. Farmers Grain Co., 258 U.S. 50, 66 L. Ed. 458, 42 Sup. Ct. Rep. 244, following and applying the principle of prior cases. Later cases have given effect to the same principle. Stafford v. Wallace, 258 U.S. 495, 516, 66 L. Ed. 735, 741, 23 A.L.R. 229, 42 Sup. Ct. Rep. 397; Binderup v. Pathe Exch., 263 U.S. 291, 309, 68 L. Ed. 308, 316, 44 Sup. Ct. Rep. 96.[29]

In *Shafer* wheat was purchased in North Dakota at some 2,200 country grain elevators by the agents of the owners and operators of the elevators. The buyers were located in the state and the contracts were made within the state. The wheat was held in the local elevators until car load lots could be assembled. 10% of the wheat was consumed in North Dakota, and 90% was bought within the state by buyers who purchased for shipment to markets outside the state.

In the cotton trade merchants like Allenberg buy cotton from the farmers in Mississippi who deliver the cotton to warehouses. Allenberg, like similar merchants, makes its purchases through the aid of country brokers who are not employees of Allenberg, but are independent contractors

[28] 268 U.S. 187 (1925). See also **Flanagan v. Federal Coal Company**, 267 U.S. 222 (1925).

[29] **Shafer v. Farmer's Grain Company**, Supra, n. 28, pp. 198-199, (emphasis added).

paid on a commission basis, thus there is even less contact in the farm state by the cotton merchant than there was in the farm state by the wheat buyers in *Shafer*. From the warehouses the cotton is grouped into even running lots for shipment and is shipped out of state. The warehouse and the grain elevator thus perform similar functions. The *Shafer* Court stated unequivocally:

> Wheat—both with and without dockage—is a legitimate article of commerce and the subject of dealings that are nationwide. *The right to buy it for shipment*, and to ship it, in interstate commerce, *is not a privilege derived from state laws*, and which they may fetter with conditions, *but is a common right, the regulation of which is committed to Congress and denied to the states by the commerce clause of the Constitution*.[30]

C. NO COUNTERVAILING POLICY IS SERVED BY THE MISSISSIPPI COURT'S DECISION

The policy served by barring a foreign corporation from access to local courts is said to be the protection of the state's citizens from lack of redress in local courts against foreign corporations.[31] However, today every state provides for service of process under long-arm statutes,[32] and it is recognized that whether a foreign corporation is protected by the commerce clause should have no bearing on whether or not service of process may be had upon it.[33]

[30] **Shafer v. Farmers Grain Company**, Supra n. 28, p. 199.

[31] Note, **Foreign Corporations - State Boundaries for National Business**, 59 Yale L. J. 737, 746 (1959).

[32] Note, Supra n. 31 p. 740, See e.g. Miss. Code 1942 Ann. § 1437.

[33] **International Harvester Co. v. Kentucky**, 234 U.S. 579 (1914).

Isaacs, An Analysis of Doing Business, 25 Col. L. Rev. 1018 (1925). "A foreign corporation's activities within the state may be sufficient to

(Continued on following page)

If a foreign corporation is "doing business" within the meaning of the due process clause of the Constitution, process may be had upon it even though it may not be required to qualify to do business because its activities are interstate commerce.[34] Furthermore, no important state

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(Continued from preceding page)
subject it to jurisdiction and make it amenable to service of process, and yet be insufficient to constitute doing business so as to require it to qualify under the statute." **Stafford-Higgins Industries, Inc.**, 300 F. Supp. 65, 67 (S.D.N.Y. 1969).

[34]The decision of the Mississippi Supreme Court fails to differentiate between different meanings of the words "doing business". The concept of "doing business" is used as a guideline in the attempt of various courts to make three different types of decisions: 1) whether the state may exercise judicial jurisdiction over the corporation; 2) whether the state may impose a tax on the corporation; 3) whether the state may require that the corporation comply with certain qualification requirements as a condition to conducting certain types of business activities.

The Restatement of Conflicts of Laws 2d at Section 311 (f) points out that these three disparate cases must be distinguished and concludes that "the degree of required activity may vary somewhat from context to context. So a lesser degree of doing business is required for the exercise of judicial jurisdiction over a foreign corporation than that usually required to make it necessary for a corporation to comply with the qualification requirements of a state."

The differences in these three types of cases reflect the different goals of the due process clause and the commerce clause. In determining whether a state may exercise judicial jurisdiction the central question is one of fairness under the due process clause; i.e. whether or not it is fair to require the foreign corporation to respond to process in the forum where it has been sued. **International Shoe Co. v. Washington**, 326 U.S. 310 (1945).

In the second type of case, the taxing cases, this Court has stated that a fairly apportioned state tax will not contravene the commerce clause; and it appears that if the state tax meets the requirements of the due process clause it will therefore not be a burden on interstate commerce repugnant to the commerce clause. **Northwestern States Portland Cement Co. v. Minnesota**, 358 U.S. 450 (1959).

In contrast, the central question in this case, as in **Dahnke**, is not a question of due process but is whether or not the action by the state is inimicable to the intention of the commerce clause to establish free trade among the states. That question is not one of fairness but whether or not the particular state action unduly burdens the operation of an open economy. The devastating consequences of a challenge to **Dahnke** reflects, in a negative way, the essential soundness of **Dahnke**. See text at notes 39-40, infra.

interest is served by a statute prohibiting the access of a foreign corporation to local courts. Denial of access only produces a windfall for a wrongdoer who is not even within the class of persons the qualification statute is designed to protect. Presumably, the statute is intended to provide redress in local courts for plaintiffs, but defendants are the only parties protected under such statutes. Defendants' claims may be made against the plaintiff foreign corporation which has joined issue with it, without concern over obtaining jurisdiction locally.

D. LONG STANDING PRINCIPLES MUST BE SUPPORTED BY THIS COURT

Fundamental principles must, from time to time, be reaffirmed if they are to have continuing validity. The legal position maintained here by Allenberg has, without doubt, been widely relied upon by large segments of the cotton merchandising industry, as well as by commodity merchants of all kinds. Cotton merchants such as Allenberg handle 70% of the entire U. S. cotton crop sold to domestic mills, and 80% of the U. S. Cotton crop sold in foreign markets.[35] To the extent that doubt may be cast on the continued validity of *Dahnke*, great dislocations may be caused in a current year of wildly increased commodity prices, as well as in the years to come. In the cotton industry alone the ramifications of a challenge to *Dahnke* cannot be exaggerated. At the time of this writing 45% of the entire United States upland cotton crop has been sold in advance of harvest.[36] The expected United

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[35]**Hearings Before the Subcommittee on Domestic Marketing and Consumer Relations of the Committee on Agriculture**, 92nd Cong., 2nd Sess. (Statement of Neal P. Gillen, Vice-President and General Counsel, American Cotton Shippers Association in connection with H.R. 14987 on August 16, 1972).

[36]Infra, n. 11.

States cotton crop is 12,740,000 bales.[37] The price of cotton has advanced from high normal levels early in the season (e.g. middling 1-1/6" cotton in the Memphis market was 31.50¢ per pound on January 31, 1973),[38] to the highest prices in 100 years (e.g. on September 21, 1973 middling 1-1/6" cotton was 86.40¢ per pound in the Memphis market).[39]

Because cotton is produced in so many states, and because the bulk of the United States crop is handled by merchants in Memphis, Tennessee,[40] it may be assumed that few, if any, merchants are qualified to do business in every state in which they have bought cotton. At a market difference of 50¢ per pound, if only a small portion of the crop which has been bought in advance is not delivered at the contract price, merchants would have enormous losses. Because the merchant buys cotton with up to 90% borrowed capital,[41] such losses could be sufficient to bankrupt the entire cotton merchandising industry.

The traditional understanding of interstate commerce includes within the concept "interstate," the purchase of goods for shipment across state lines. This is reflected in the Commodity Exchange Act,[42] which defines interstate commerce as follows:

> For purposes of this Act . . . a ***transaction*** in respect to any article ***shall be considered to be in inter-***

[37] **August 1 Crop Report**, Supra, n. 16, p. 2.

[38] **The Memphis Commercial Appeal**, February 1, 1973, p. 55.

[39] **The Memphis Commercial Appeal**, September 21, 1973, p. 28.

[40] **Cotton Situation**, Supra, n. 14.

[41] A. B. Cox, Supra, n. 4, p. 181.

[42] Commodity Exchange Act, Supra, n. 12.

> ***state commerce if such article is part of that current of commerce usual in the commodities trade*** whereby commodities and commodity products and by-products thereof are sent from one State with the expectation that they will end their transit, after purchase, in another, ***including*** in addition to cases within the above general description, ***all cases where purchase*** or sale ***is*** either ***for shipment to another state***, or for manufacture within the state and the shipment outside the state of the products resulting from that manufacture. Articles normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto, from the provisions of this Act.[43]

The above definition is itself an interpretation of the commerce clause by the Congress, and it reflects the understanding by Congress that transactions made in a manner usual in the commodities trade, including purchases for shipment, are within the ambit of the commerce clause of the Constitution.[44]

Hamilton wrote, "an unrestrained intercourse between the states themselves will advance the trade of each, by an interchange of their respective productions, not only

[43] Commodity Exchange Act, Section 3, Supra, n. 12 (emphasis added).

[44] This understanding is also reflected in the exercise of Congressional power to protect the integrity of the national commodities merchandising system. The Commodities Exchange Act, Section 6c, Supra, n. 12, makes it "unlawful for any person to offer to enter into, enter into, or confirm the execution of any transaction involving any commodity, which is or may be used for . . . delivering any such commodity sold . . . in interstate commerce for the fulfillment thereof . . . if such transaction . . . is a fictitious sale."[3] If the purchase of Pittman's cotton by Allenberg is not a valid enforceable obligation, it would be fictitious under Section 6c and violate that law, because Allenberg had purchased Pittman's cotton to fulfill previously incurred delivery obligations in interstate commerce.

for the supply of reciprocal wants at home, but for exportation to foreign markets."[45]

The cotton merchandising system as it exists today is a realization of the goal foreseen by Hamilton. The decision of the Mississippi Supreme Court in this case is a direct challenge to that goal.

CONCLUSION

For the foregoing reasons, summary reversal should be granted, or in the alternative, probable jurisdiction should be noted.

Respectfully submitted,

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Of Counsel

[45] **The Federalist No. 11**, at 52 (Cooke ed. 1961), cited in Note, Developments-State Taxation, 75 Harv. L. Rev. 953,956 (1962).

Appendix

IN THE SUPREME COURT OF MISSISSIPPI

NO. 47,037

[fol. 1]

BEN E. PITTMAN

v.

ALLENBERG COTTON COMPANY

SMITH, JUSTICE:

Allenberg Cotton Company, a Tennessee corporation, brought suit in the Chancery Court of Quitman County against Ben E. Pittman for injunctive enforcement of a contract for the purchase by it of cotton produced by Pittman in the year 1971 on 700 acres of his land in Quitman County, Mississippi. Under the terms of the contract, Pittman was required to plant, cultivate and harvest a crop of cotton on the land, employing methods provided in the contract, then to deliver it to Valley Gin Company in Marks, Mississippi for ginning. Under the contract, Allenberg retained certain control as to methods to be employed in the production of the cotton, and, after ginning, Pittman was obligated to deliver the bales for the account of Allenberg at the warehouse of Federal Compress and Warehouse Company at Marks, Mississippi. The contract also provided a formula for determining amounts to be paid for the cotton. The bill of complaint alleged a refusal on the part of Pittman to de-

[fol. 2] liver the cotton, and in addition to injunctive relief, demanded damages for breach of contract.

Allenberg Cotton Company, a Tennessee corporation, had never qualified to do business in the State of Mississippi. Its charter, granted by the State of Tennessee, among other things, authorized it:

> Section A: To carry on the business of cotton merchants including the buying and selling of spot cotton, the dealing in cotton futures, the storing, warehousing, insuring, and hedging of the cotton and cotton sales or puchases; [sic] the borronwin [sic] or lending of money, unsecured, or secured by cotton warehouse receipts or otherwise, and in general, any other business that may be allied therewith, or ancillary thereto, or useful in the advancement of the general purposes of the business of cotton merchants, and any other business that can be conducted along with said business, or that might advance the purposes, including the right to deal in any commodity by the actual sale or purchase of same by private negotiations or on any organized market, and also including the purchases or sales of future contracts or hedges for any such other commodity.

Pittman set up several defenses in his answer, and pleaded that Allenberg Cotton Company was a foreign corporation, doing business in Mississippi, but it had never qualified to do so by securing a certificate of authority as required by Mississippi Code 1942 Annotated section 5309-221 (Supp. 1972). Pittman alleged that, as a consequence of this failure to qualify, Allenberg was not entitled to maintain its suit under the provisions of Mississippi Code 1942 Annotated section 5309-239 (Supp. 1972), which is (in part) as follows:

> No foreign corporation transacting business in this state without a certificate of authority shall be permitted

[fol. 3] to maintain any action, suit or proceeding in any court of this state. Nor shall any action, suit or proceeding be maintained in any court of this state by any successor or assignee of such corporation on any right, claim or demand arising out of the transaction of business by such corporation in this state.

The proof showed that Allenberg had arranged with one Covington, a local cotton buyer, with his office in Marks, Mississippi, to act for them (although it is denied that this made him its agent) "to contract cotton" from cotton farmers to be produced in Quitman County, Mississippi. Although Covington had performed this service for another company in 1967, in 1970 and in 1971 he acted exclusively for Allenberg. Under his arrangement with Allenberg, Covington would contact Quitman County farmers and, if they agreed to produce and sell their cotton crop to Allenberg, he would obtain all information necessary to the preparation of a purchase contract, telephone this information to Allenberg's Memphis office where a contract would be prepared and signed by an official of Allenberg. This document would then be forwarded to Covington at his office in Marks. On its receipt, Covington would get in touch with the farmer who would then come in to Covington's office in Marks and there execute the contract. One copy would be retained by Covington in his Marks office, one copy would be given to the farmer and the third copy sent to Allenberg Cotton Company. For these services Covington received a commission on each bale of cotton delivered to Allenberg's account at

[fol. 4] the warehouse. Covington kept a record of these contracts in his Marks office, including a record of whether the farmers were delivering as required by their contracts. Farmers were paid for cotton

delivered under the Allenberg contracts by Covington who drew upon Allenberg for the money.

Covington testified that the Pittman contract, here involved, had been brought personally to his office in Marks by the official of Allenberg who was in charge of the "Memphis Territory" which included Mississippi. He recalled that seven or eight other similar Quitman County contracts had also been brought down at the same time. He stated that usually, but not always, the contracts were mailed to him by Allenberg and that actually it was not necessary for an official of the company to come to Marks, saying "I could tend to it. I reckon I was supposed to do something." He stated that he kept up with whether deliveries of cotton were being made by the farmers as required by the contracts and that some contracts were "adjusted" by an official of Allenberg who would come down to Quitman County for that purpose.

It appears that Allenberg, through its representative, Covington, by whatever name called, in the year 1971 alone, the second year of its Mississippi operation, made 20 to 25 similar contracts covering 9,000 acres of cotton land in Quitman County, Mississippi.

It is apparent that these transactions of Allenberg in each case, including that with Pittman, took
[fol. 5] place wholly in Mississippi. The contract was negotiated in Mississippi, executed in Mississippi, the cotton was produced in Mississippi, delivered to Allenberg at the warehouse in Mississippi, and payment was made to the producer in Mississippi. All interest of the producer in the cotton terminated finally upon delivery to Allenberg at the warehouse in Marks. The fact that afterward Allenberg might or might not sell the cotton in interstate commerce is irrelevant to the issue here, as

the Mississippi transaction had been completed and the cotton then belonged exclusively to Allenberg, to be disposed of as it saw fit, at its sole election and discretion.

The facts stated were developed upon the hearing of the plea and are without substantial dispute. The chancellor held, however, that Allenberg was not doing business in Mississippi within the meaning of the statute. It having been stipulated that no further defense would be offered, the court entered a decree awarding Allenberg judgment against Pittman for $18,156.00 as damages sustained because of his breach of the contract. This appeal has been prosecuted by Pittman from that decree.

It is argued on behalf of Allenberg that its Mississippi activities fall within the following statutory exceptions.

> Without excluding other activities which may not constitute transacting business in this state, a foreign corporation shall not be considered to be transacting business in this state, for the purposes of this Act, by reason of carrying on in this state any one
> [fol. 6] or more of the following activities:
>
> . . . .
>
> (d) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance without this state before becoming binding contracts.
>
> (e) Transacting any business in interstate commerce.

We cannot agree. The entire transactions with respect to Mississippi cotton contracts took place in Mississippi. The contracts were not "orders", within the commonly accepted meaning of that word, "requiring acceptance without this state before becoming binding contracts."

Aside from the fact that they were not "orders", they became contracts only when executed by the producer at Marks, Mississippi.

The affixation of Allenberg's signature in Memphis to a contract form before it was sent or brought to Marks for execution by the producer in nowise made it a contract prior to its acceptance and execution by the producer at Marks. Nor is the transaction converted into interstate commerce because, after the cotton had been delivered to Allenberg at the warehouse in Marks and title thereto had become vested in Allenberg in Mississippi, Allenberg, at its own election and for its own purposes, might afterward sell it in interstate commerce.

In order to maintain an action in a court of this State,
[fol. 7] a foreign corporation doing business in this State must qualify as required by the statute at the time the cause of action accrued. Parker v. Lin-Co Producing Company, 167 So.2d 228 (Miss. 1967).

Nor may a foreign corporation, doing business in Mississippi without having qualified as required by statute, maintain an action in a court of this State to enforce a cause of action which accrued as the result of doing such business. Bunge Corporation v. St. Louis Terminal Field Warehouse Company, 295 F. Supp. 1231 (N.D. Miss. 1969).

Where the charter of a foreign corporation provided that it was formed to sell, lease and exchange real estate of all kinds, and such corporation obtained a lease upon Mississippi real property for a ten year term, and thereafter renewed it for an additional ten years, and paid rentals under the provisions of such renewal and initial leases and sought an option to purchase the real estate, the corporation was held to have been "transacting business" in

Mississippi within the meaning of the statute. S & A Realty Company v. Hilburn, 249 So.2d 379 (Miss. 1971).

The plea should have been sustained and Allenberg's suit should have been dismissed. The judgment appealed from is, therefore, reversed and judgment is entered here sustaining the plea interposed by Pittman against the right of Allenberg to maintain its suit against him in the Mississippi Court, and the suit is dismissed.

REVERSED AND JUDGMENT ENTERED FOR APPELLANT.

GILLESPIE, C.J., and PATTERSON, INZER and ROBERTSON, JJ., CONCUR.

IN THE SUPREME COURT OF MISSISSIPPI

[fol. 1]

MONDAY, MAY 14, 1973, COURT SITTING : : : : : : : :

BEN E. PITTMAN

#47,037 VS

ALLENBERG COTTON COMPANY

This cause this day came on to be heard on the Petition for a Rehearing filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be denied doth order and adjudge that said Petition be and the same is hereby denied.

MINUTE BOOK "BQ" PAGE 195

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

[fol. 1]

BEN E. PITTMAN,
Appellant

vs.

ALLENBERG COTTON COMPANY, INC.,
Appellee

NO. 47,037

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed August 8, 1973)

I. Notice is hereby given that Allenberg Cotton Company, Inc., the appellee above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Mississippi, entered on May 14, 1973 denying appellee's petition for rehearing and giving finality to the court's judgment and order dismissing appellee's suit.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the clerk of the Supreme Court of the United States.

III. The following question is presented by this appeal:

Whether the Mississippi Supreme Court's application of Miss. Code 1942 Ann. Section 5309-239 (Supp. 1972) to

Allenberg Cotton Company, Inc., a Tennessee corporation, to bar it from maintaining suit in the courts of Mississippi is repugnant to the Commerce Clause of the Constitution of the United States, U. S. Const., art. I, Section 8, cl. 3.

GOODMAN, GLAZER, STRAUCH & SCHNEIDER

By /s/ William W. Goodman

MAYNARD, FITZGERALD, MAYNARD & BRADLEY

By /s/ Wm. H. Maynard

Attorneys for Allenberg Cotton Company, Inc.

[fol. 2] PROOF OF SERVICE

I, William H. Maynard, one of the attorneys of record for Allenberg Cotton Company, Inc., depose and say that on the 6 day of August, 1973 I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the attorneys for Ben E. Pittman by depositing copies of the same in the United States mails, first class postage prepaid addressed to the Hon. Ellen E. Goldman, P. O. Box 88, Marks, Mississippi, 38646, and to the Hon. Anna C. Madden, Cliff Finch Bldg., Batesville, Mississippi 38606.

/s/ William H. Maynard

Subscribed and sworn to before me at Clarksdale, Miss. this 6 day of August, 1973.

/s/ Sherry J. Ely
Notary Public

My commission expires:
5-26-74

SUPREME COURT OF THE UNITED STATES

[fol. 1] No. A-177

ALLENBERG COTTON COMPANY, INC.,
Petitioner,

v.

BEN E. PITTMAN

ORDER

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari or for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including October 11, 1973.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Dated this Seventh
day of August, 1973.

IN THE SUPREME COURT OF MISSISSIPPI

[fol. 1]

BEN E. PITTMAN

VERSUS

ALLENBERG COTTON COMPANY, INC.

NO. 47,037

ORDER CERTIFYING ISSUES DECIDED

On application of the appellee, Allenberg Cotton Company, Inc., this Court in addition to the orders made herein, hereby certifies and makes a part of the record in this case and of the judgment and entry of reversal heretofore rendered and made herein, that in this appeal from the Chancery Court of Quitman County, and in the arguments both oral and by brief made in this Court on behalf of the appellee on the original appeal and the petition of appellee for rehearing and brief filed in support thereof, it was insisted by appellee that under the facts of this case, the contract sued upon by the appellee was made in "interstate commerce" and that it was transacting business in interstate commerce, and thus entitled to protection as such under the applicable statutes of Mississippi and the Commerce Clause of the Federal Constitution; and that in its deliberation of this case, this Court both on the original appeal and the petition for rehearing considered these questions of interstate commerce; and it was the judgment of this Court that said contract was not made in interstate commerce, nor that the facts of the

[fol. 2] case showed appellee to be transacting business in interstate commerce within the meaning of the laws of Mississippi and that Mississippi Code 1942

Ann. Section 5309-239 (Supp. 1972) as applied by this Court in this case to the Allenberg Cotton Company, Inc., a Tennessee corporation, to bar it from maintaining suit in the courts of this state was not repugnant to the Commerce Clause of the United States Constitution; and it was necessary to the Court's judgment in said case to determine said questions raised as to interstate commerce, and that such questions were determined adversely to the position of appellee.

It is hereby certified that this Court is the highest court of law and equity in the State of Mississippi in which a decision of this case could be had.

ORDERED, this the 17th day of August, 1973.

/s/ Robert G. Gillespie
CHIEF JUSTICE
SUPREME COURT OF MISSISSIPPI

[fol. 3]

STATE OF MISSISSIPPI
HINDS COUNTY

I, Mrs. Julia H. Kendrick, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the foregoing is a true and correct copy of the Order Certifying Issues Decided by the Court in the case of Ben E. Pittman versus Allenberg Cotton Company, Inc., No. 47,037 - as the same appears of record on file in my office.

Given under my hand, with the seal of said Court affixed, at office, in the City of Jackson, Mississippi, this the 17th day of August, A.D. 1973.

/s/ Julia H. Kendrick
SUPREME COURT CLERK

Supreme Court, U. S.
FILED
DEC 23 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

NO. 73-668

ALLENBERG COTTON COMPANY, INC.,
Appellant,

v.

BEN E. PITTMAN,
Appellee.

On Appeal from the Supreme Court of the State of Mississippi

SUPPLEMENTAL BRIEF OF APPELLANT CONTAINING NEW CASE AUTHORITY

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2-22-74-60

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-628

ALLENBERG COTTON COMPANY, INC.,
Appellant

v.

BEN E. PITTMAN,
Appellee

On Appeal from the Supreme Court of the State of Mississippi

SUPPLEMENTAL BRIEF OF APPELLANT CONTAINING NEW CASE AUTHORITY

Pursuant to Rule 16 of this Court, Appellant Allenberg hereby calls the Court's attention to the Memorandum of Opinion in the companion cases of ***Allenberg Cotton Company, Inc. v. R. W. Coleman, et al***, No. EC 73-89-S, and ***Cone Mills Corporation v. Wayne Hurdle, et al***, No. WC 73-91-S, decided January 10, 1974, in the United States District Court for the Northern District of Mississippi.

This decision was not available at the time the Jurisdictional Statement was filed on October 9, 1973.

This Memorandum Opinion is directly in point to the issues raised in this appeal and discusses the effect on interstate commerce of the Mississippi Supreme Court's decision in the present case here under consideration in this Court. The Memorandum Opinion follows ***Dahnke-Walker***[1] and holds that Allenberg Cotton Company and Cone Mills Corporation may enforce contracts in Mississippi courts for the purchase of cotton in Mississippi without qualifying to do business in Mississippi because such purchases are made in interstate commerce.

Because of the importance of the Memorandum Opinion as authority in this case, and because of its scholarship in reviewing the leading Commerce Clause decisions in agricultural cases, the opinion is set out virtually verbatim in the appendix. Counsel is informed that the Memorandum Opinion will be published, but no citation is available at the present time.

CONCLUSION

For the reasons set forth in Allenberg's Jurisdictional Statement, and based on the additional authority of ***Allenberg Cotton Company, Inc. v. Coleman, supra***, appellant prays for summary reversal, or, in the alternative, that probable jurisdiction be noted.

Respectfully submitted,

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[1] **Dahnke-Walker Milling Co. v. Bondurant**, 257 U.S. 282 (1921). This is the central case relied upon by appellant in this appeal. See Jurisdictional Statement, p. 17.

Appendix

[fol. 1] In The

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

CONE MILLS CORPORATION,
Plaintiff

v.

WAYNE HURDLE, ET AL,
Defendants

No. WC 73-91-S

ALLENBERG COTTON CO., INC.,
Plaintiff

v.

R. W. COLEMAN, ET AL,
Defendants

No. EC 73-89-S

MEMORANDUM OF OPINION

A. PRELIMINARY STATEMENT

Each of the above actions is before the court upon a motion to dismiss. Relevant facts have been presented by way of affidavits and admissions. The motions have been briefed and argued extensively. The court has also received amicus curiae briefs from two trade associations with a meaningful interest in the resolution of the primary issue before the court.[1] The trade associations furnish-

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[1] There are several grounds upon which each motion is based, but the primary ground, common to both actions, is that the corporate plaintiff is barred from access to this court to enforce the contracts because, as a foreign corporation, it engaged in doing business in Mississippi without having qualified to do so as required by Mississippi law.

[fol. 2] ing briefs are The American Textile Manufacturers Institute, a trade association for the cotton, man-made fibers, silk, and wool segments of the United States textile industry, and The American Cotton Shippers Association, a trade association of cotton merchants, shippers, and exporters.

The court's jurisdiction is invoked under 28 U.S.C.A. § 1332. Violations of the Commodity Exchange Act[2] and the Sherman Anti-trust Act[3] have also been alleged. At this stage, however, the fundamental question in each action involves the enforceability vel non of contracts for the advance or forward sale of cotton fiber grown for the 1973 crop year. Although these actions do not arise in identical factual settings, they share remarkable similarities and involve the same primary issue of law. The court, therefore, has decided to consider and discuss both in a single opinion.

During 1973 the price of raw cotton fiber on world markets rose in a sudden and spectacular fashion. Weather conditions, unprecedented foreign and domestic demand, dollar devaluation, and related factors combined to cause the market price to more than double within a six month period. When money speaks enticingly, listeners often become litigants.

The court will take judicial notice of its own docket and observe that literally scores of suits have been filed to either enforce or rescind advance or forward
[fol. 3] contracts for the sale and delivery of cotton fiber. In the present actions, buyer-plaintiffs

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2 7 U.S.C.A. § 6(c).

3 15 U.S.C.A. § 1.

are seeking to enforce cotton contracts on the terms and conditions allegedly agreed upon. The seller-defendants have moved to dismiss on several grounds. As noted, their primary contention is that a foreign corporation doing business in Mississippi without having qualified to do so prior to execution of the contracts is barred by Mississippi law from access to any court in Mississippi, state or federal, to enforce the contracts.

B. THE CONTRACTUAL BACKGROUND

Cotton growers have traditionally sold their annual harvest on the open market some time after planting. Government price supports have, in some measure, enabled growers to reduce the risk of a buyer's market during seasons of abundant harvest or lagging demand.[4] The government's purpose has been to encourage continued, steady production by insuring an adequate profit for the grower. Since an artificial market tends to promote surplus production, the government may also pay to insure that crops are planted only on a limited number of acres.

Increasing sophistication in growing, milling, and marketing techniques has fostered the utilization of the "forward" contract; a relatively new feature which is now gaining acceptance throughout the cotton industry. By forward contracting, a grower agrees to sell his future crop before it is planted or soon thereafter. A
[fol. 4] capable farmer can virtually assure himself a profit even before planting. If he is unable to negotiate a price which he anticipates will be profitable, he may plant other crops which are in demand or simply allow his land to lie fallow. Thus, in theory at least,

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4 7 U.S.C.A. § 1421, et seq.

forward contracting will help restore traditional principles of supply and demand to the cotton market with the added feature that the element of risk is reduced.

The grower, moreover, can borrow on forward contracts and textile mills can price their finished product long before manufacture. Forward contracting also enables the retail merchant to determine the price of an article manufactured from cotton months in advance. However, these qualities are discussed merely to provide background. It is not necessary to consider the social aspects of forward contracting in order to reach a decision.

C. THE FACTUAL BACKGROUND

(1) Cone Mills Corporation (Cone), the plaintiff in WC 73-91-S, is a corporate citizen of North Carolina with its principal place of business in that state. Cone manufactures textiles and operates mills in several states for that purpose. None, however, are or were during the pertinent period situated in Mississippi. The defendants, both individuals and partnerships, are citizens of Benton or Marshall Counties, Mississippi. They are cotton growers or producers.

Cone utilizes or blends various grades and varieties of cotton to manufacture textiles, and apparently
[fol. 5] buys cotton direct from many areas. The cotton grown in Benton and Marshall Counties is strict low middling or better 1-1/16 inch staple; a variety primarily used by Cone to manufacture corduroy fabric.

Through a local agent, Cone executed the subject contracts in Mississippi at a time when it had not qualified to do business in Mississippi. Qualification was subsequently perfected on September 27, 1973, seventeen days after

Cone received notification from the defendants, all of whom acted upon the advice of the same attorney, that they would not honor the contracts nor deliver the cotton.

Each contract provided that the cotton was to be delivered to the buyer at a Mississippi gin or compress. On each of the contracts Cone's place of business was penciled in as "Slayden, Mississippi". Slayden, however, was the residence of Cone's agent. Although several of the defendants had sold their 1972 crop to Cone's agent, each denied having knowledge that Cone was the actual purchaser. Apart from the contracts, evidence adduced on behalf of the plaintiff demonstrates that Cone at all times contemplated loading the cotton on board trucks after ginning for shipment to its mills outside Mississippi.

(2) Allenberg Cotton Co., Inc. (Allenberg), the plaintiff in EC 73-89-S, is a corporate citizen of Tennessee with its principal place of business in that state. Allenberg is primarily a merchant or "middle-man" company engaged in the business of buying and selling cotton in numerous states, including Mississippi. Allenberg also merchandises cotton in foreign countries. The defend-
ants are citizens of and cotton growers in
[fol. 6] Chickasaw and Lee Counties, Mississippi.

The subject contracts were initially executed in Mississippi by the defendants and Allenberg's agent, also a corporate citizen of Tennessee. Subsequently, they were transmitted to Memphis and signed by an officer of Allenberg. The defendants were aware they were selling their crop to Allenberg. The contracts called for the cotton to be ginned and baled locally and delivered on board Allenberg's trucks at the gin.

At the time of execution, Allenberg had not qualified to do business in Mississippi. On May 29, 1973, Allenberg qualified. About September 25, Allenberg was notified that defendants would not honor the contracts nor deliver the cotton.

D. DETERMINING THE APPLICABLE LAW

Miss. Code Ann. § 79-3-211 (1972) provides in pertinent part:

> No foreign business corporation for profit shall have the right to transact business in this state until it shall have procured a certificate of authority so to do from the secretary of state . . .
>
> Without excluding other activities which may not constitute transacting business in this state, a foreign corporation shall not be considered to be transacting business in this state, for the purposes of this chapter, by reason of carrying on in this state any one or more of the following activities:
>
> . . . .
>
> (e) Transacting any business in interstate commerce.

[fol. 7] *Miss. Code Ann.* § 79-3-247 (1972) provides in pertinent part:

> No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state . . . .
>
> The failure of a foreign corporation to obtain a certificate of authority to transact business in this state shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action, suit or proceeding in any court of this state.

Miss. Code Ann. § 79-3-289 (1972) provides in pertinent part:

> The provisions of this chapter shall apply to commerce with foreign nations and among the several states only in so far as the same may be permitted under the provisions of the Constitution of the United States.

The penalty or sanction statute, § 79-3-247, is designed to enable Mississippi citizens to seek necessary judicial redress locally by encouraging "foreign" corporations transacting business in Mississippi to make themselves amenable to process in this state.[5] On its face, the penalty statute appears to apply a broad and independent prohibition. However, the Mississippi Supreme Court regularly construes the penalty provision in conjunction with § 79-3-211, *supra*. E. g., *Ross Construction Co. v. U. M. & M. Credit Corp.*, 214 So.2d 822 (Miss. 1968).

This court, therefore, concludes that the legislative exceptions, embodied in § 79-3-211, to [fol. 8] the qualification or licensing requirement are applicable to the penalty statute as a matter of Mississippi law.

In *Parker v. Lin-Co.*, 197 So.2d 228, 230 (Miss. 1967) the Mississippi Supreme Court held:

> It is the opinion of this Court that the Legislature prohibited a foreign business corporation from doing business in this state without first qualifying as required by the act, and in the event such corporation

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[5] Compare the provisions of the state's long arm statute, **Miss. Code Ann.** § 13-3-57 (1972).

violated this prohibition, it could not use the courts of this state to enforce any right of action that accrued prior to the time it qualified to do business in this state. To allow a corporation that has violated the express terms of the statute to avoid the effect of the statute by qualifying only in the event it found it necessary to enforce a cause of action, would defeat the purpose of the Legislature. We hold that a foreign corporation doing business in Mississippi without having qualified as required by statute cannot use the courts of this state to enforce any cause of action that accrued as a result of doing such business.

Consequently, this court recognizes the prevailing rule of law in Mississippi to be that a foreign corporation which is doing business in Mississippi is precluded from resorting to the courts of this state to enforce an alleged right unless it had qualified to do business in Mississippi at the time of the transaction out of which such right arose, or unless the transaction falls within an exempted category; i.e., if the right it seeks to enforce is exempted or protected as a transaction in interstate commerce under the Commerce Clause of the Constitution of the
[fol. 9] United States.[6] The prohibition to prosecute an action in the state courts has been extended to federal courts sitting within the state. *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949).

Although this issue has not been discussed in any opinion, we conclude that the Mississippi Supreme Court would hold that the state legislature intended to adopt the federal constitutional standard when it enacted the interstate commerce exception to the qualification requirement. There-

[6] U. S. Const. Art. I, § 8, Clause 3.

fore, a Mississippi court, when determining what activities constitute interstate commerce within the contemplation of the exempting statute, would consider itself bound by the express language of § 79-3-289 of the Mississippi Code to apply the federal standard, if indeed there is any difference between state and federal standards. Otherwise, the statutory language "only in so far as the same may be permitted under the provisions of the Constitution of the United States" would be meaningless.

It would be unrealistic to conclude the interstate commerce exception was enacted as a voluntary exercise of legislative grace. It is a recognition of a constraint imposed upon state power by the Commerce Clause. This court, moreover, is obligated to adopt a construction of the Mississippi statute which will not force state law into a potential conflict with the federal constitution, unless an opposite construction is plainly required by clear state court precedent.

In determining whether the plaintiffs can maintain their actions in this court, we must, therefore, apply
[fol. 10] a state law which incorporates a federal constitutional standard. If the subject transactions constituted doing business in interstate commerce as that criterion is judged by the federal standard, then the plaintiffs are not barred from access to this court as a matter of Mississippi law although they had failed to qualify to do business at the time of the transactions.

Despite the fact that the state court must apply a federal standard, this court—as a federal forum—is not necessarily bound, even when sitting in a diversity case, by a prior determination of the highest state court on a matter arising under the Commerce Clause. *Kansas City Structural Steel Co. v. Arkansas*, 269 U.S. 148 (1925). Natu-

urally this court would rely heavily upon a determination by the Mississippi Supreme Court, particularly where a federal standard is applied to construe state law. Nonetheless, this court perceives a duty to make an independent adjudication of a right asserted by virtue of federal law unless an in-point decision by the state court has been given express, or clearly implied, approval by an appropriate federal tribunal. See, ***Holmberg v. Armbrecht***, 327 U.S. 392 (1946).

In summary, sitting in diversity as a Mississippi Court we have determined that the state intended to and did incorporate a federal standard into state law. Thereafter, we must sit as a federal court to apply the standard.

E. DISCUSSION OF THE LAW

[fol. 11] None of the defendants seriously contend the cotton was not ultimately destined for shipment and use in interstate commerce. They urge that these particular transactions were wholly intrastate because the contracts were completed and the defendants' interest terminated before the cotton had any ascertainable destination outside Mississippi and the plaintiffs might have used or disposed of the cotton entirely within Mississippi. Defendants contend that the alleged intent of the plaintiffs to transport the cotton in interstate commerce was not fixed from the outset, and that these transactions were completed before there was or could have been interstate use or shipment. In support of their position, defendants rely heavily upon ***Pittman v. Allenberg Cotton Co.***, 276 So.2d 678 (Miss. 1974), a case which presented facts and issues similar to those now before the court. Allenberg, a plaintiff here, was the appellee.

Pittman, a cotton grower in Quitman County, Mississippi, contracted to sell his 1971 crop to Allenberg. The contract resembled those involved in this litigation. After execution of the contract, the price of cotton fiber rose and Pittman failed or refused to perform. Allenberg brought suit in the Chancery Court of Quitman County for specific performance and damages. Pittman pleaded that Allenberg was doing business in Mississippi without having obtained a certificate of authority and was thus barred from resorting to a Mississippi court to enforce the contract. The chancellor determined that Allenberg was not doing business in Mississippi within the meaning of the statute and awarded damages in excess of $18,000 for breach of contract. On appeal, the Mississippi Supreme Court reversed and entered judgment for

[fol. 12] Pittman.

The basis of the decision was grounded upon the court's determination that Allenberg was in fact doing business in Mississippi within the meaning of the statute and, consequently, the transaction was not one in interstate commerce. The court reasoned that all Mississippi dealings were completed before the cotton had a known destination out-of-state. Allenberg presumably did not or could not prove its Mississippi activities were a direct component of a particular interstate transaction. Cf., ***Union Cotton Oil Co. v. Patterson***, 116 Miss. 802, 77 So. 795 (1918). In ***Pittman***, the court held at 681:

> It is apparent that these transactions of Allenberg in each case, including that with Pittman, took place wholly in Mississippi. The contract was negotiated in Mississippi, executed in Mississippi, the cotton was produced in Mississippi, delivered to Allenberg at the warehouse in Mississippi, and payment was made to

the producer in Mississippi. All interest of the producer in the cotton terminated finally upon delivery to Allenberg at the warehouse in Marks. The fact that afterward Allenberg might or might not sell the cotton in interstate commerce is irrelevant to the issue here, as the Mississippi transaction had been completed and the cotton then belonged exclusively to Allenberg, to be disposed of as it saw fit, at its sole election and discretion . . . .

Nor is the transaction converted into interstate commerce because, after the cotton had been delivered to Allenberg at the warehouse in Marks and title thereto had become vested in Allenberg, at its own election and for its own purposes, might afterward sell it in interstate commerce.

[fol. 13] The court, however, failed to state whether it was applying federal or state standards in construing interstate commerce, or whether, in its opinion, there is a difference. It is clear that the court did not assign great weight to the contention that the whole purpose of buying Mississippi cotton is to ship and use it in interstate commerce. In another context, this may have been a matter of judicial notice years earlier. "It is a matter of common knowledge in the cotton trade, of which the courts will take judicial notice, that cotton in a compress is on its way to market and ultimately to the textile mills, and that the market and the mills are often in other states or foreign countries". *Gidden v. Gidden*, 174 Miss. 108, 167 So. 785, 790 (1936).

In *Pittman*, the court apparently chose to apply a relatively narrow or, for lack of a better term, restrictive view of interstate commerce. It did not apply an "aggre-

gate effects" test,[7] or any other less rigid concept. An important element was the fact that the cotton was to be warehoused before shipment. *Pittman* is now pending an appeal before the United States Supreme Court and Allenberg has been afforded an opportunity to secure for the court's consideration of the jurisdictional statement a certificate from the Mississippi Supreme Court as to whether its judgment was intended to rest on an adequate and independent state ground or on federal grounds. *Allenberg Cotton Co., Inc. v. Pittman*, 42 LW 3362 (December 17, 1973).

[fol. 14] Defendants also rely on *Lilly & Co. v. Savon-Drugs*, 366 U.S. 276 (1961); *Federal Compress v. McLean*, 291 U.S. 17 (1934); and *Chassanoil v. Greenwood*, 291 U.S. 584 (1934). Both *Chassanoil* and *McLean* "involved taxes imposed by Mississippi on a cotton warehouse and compress business located within that state. The taxes were non-discriminatory and were levied both on the warehoused cotton and on certain processes necessary to ready it for subsequent resale. The taxes were challenged as unlawful burdens on interstate commerce, since most of the taxed cotton was ultimately to be shipped to out-of-state buyers. The Court upheld the constitutionality of the Mississippi taxes. It is not entirely clear from the Court's opinions whether their rationale was that the taxes were imposed before interstate commerce had begun, or that the burden on commerce was at the most indirect and remote." *Pike v. Bruce Church*, 397 U.S. 137, 141 (1970). In addition, both of "those cases involved cotton that had come to rest in Mississippi and '[b]efore shipping orders [were] given,

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[7] **Wickard v. Filburn**, 317 U.S. 111 (1942).

it [had] no ascertainable destination without the state.'" 397 U.S. at 141. The holding in *Lilly & Co. v. Sav-on-Drugs, supra*, was based on the fact that Lilly was conducting intrastate as well as interstate business. The suit arose out of Lilly's intrastate activities, and by such activities Lilly subjected itself to the requirements and sanctions of New Jersey's licensing laws.

The plaintiffs rely upon a series of cases involving the interstate shipment and use of wheat. In *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921) the plaintiff operated a feed and flour mill in Tennessee. Bondurant, the defendant, was a Kentucky farmer.
[fol. 15] Dahnke-Walker contracted to purchase from Bondurant a crop of wheat estimated at 14,000 bushels. The contract was executed in Kentucky and the wheat was to be paid for there. The wheat was to be loaded by Bondurant on board the cars of a common carrier in Kentucky. Dahnke-Walker intended to ship the wheat to its mill in Tennessee. Dahnke-Walker had followed a practice of buying Kentucky wheat for its mill and, on previous occasions, had purchased wheat from Bondurant for this purpose. After partial delivery, the price of wheat advanced and Bondurant refused further performance.

Dahnke-Walker sued in a Kentucky court, and Bondurant defended on the ground that the plaintiff had not complied with a Kentucky statute prescribing the conditions on which foreign corporations might do business in that state. For this reason Bondurant contended the contract was not enforceable.

The suit resulted in a judgment for Dahnke-Walker at the trial court. But the Court of Appeals, while conceding the invalidity of the statute as applied to transactions in interstate commerce, held the transaction in question

was not in such commerce, declared the statute valid and properly enforceable as to that transaction, and reversed judgment with directions for a new trial. The Court of Appeals proceeded on the theory that, as the contract was made in Kentucky, related to property then in that state, and was to be wholly performed in Kentucky, the transaction was strictly intrastate and not protected by the Commerce Clause. At the second trial, a verdict
[fol. 16] was directed for Bondurant and the case was then affirmed in the Court of Appeals. Dahnke-Walker then appealed to the United States Supreme Court. In reversing the judgment, and holding the state statute to be repugnant to the Commerce Clause, the court said:

> The commerce clause . . . expressly commits to Congress and impliedly withholds from the several states the power to regulate commerce among the latter. Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. . . . Where goods are purchased in one state for transportation to another, the [interstate] commerce includes the purchase quite as much as it does the transportation." (Citations omitted) 257 U.S. at 290.

The court looked to the practice and intent of the plaintiff and the general course of the business.

> The state court, stressing the fact that the contract was made in Kentucky and was to be performed there, put aside the further facts that the delivery was to be on board cars, and that the plaintiff, in continuance of its prior practice, was purchasing the grain for shipment to its mill in Tennessee. We think the facts so neglected had a material bearing and should have been

considered. They showed that what otherwise seemed an intrastate transaction was a part of interstate commerce. The state court attached some importance to the fact that after the grain was delivered on the cars, the plaintiff might have changed its mind and have sold the grain at the place of delivery, or could have shipped it to another point in Kentucky. Not that this
[fol. 17] was impossible, but it was also improbable. . . . The essential character of the transaction as otherwise fixed was not changed by a mere possibility of that sort. (Citations omitted) 257 U.S. at 292.

In a closely analogous case, the Supreme Court also relied upon the ordinary and traditional course of business as the factor which clearly fixed and determined the interstate character of the transaction. *Lemke v. Farmers' Grain Co.*, 258 U.S. 50 (1922). In *Shaffer v. Farmers' Grain Co.*, 268 U.S. 189 (1925), the court held at 198, 199:

> Buying for shipment, and shipping, to markets in other states when conducted as before shown, constitutes interstate commerce, —the buying as much a part of it as the shipping . . . . Wheat . . . is a legitimate article of commerce and the subject of dealings that are nationwide. The right to buy it for shipment, and ship it in interstate commerce, is not a privilege derived from state laws, and which they may fetter with conditions, but is a common right the regulation of which is committed to Congress and denied to the states by the commerce clause of the Constitution.

More recently, in *United States v. Rock Royal*, 307 U.S. 533, 568, 569 (1939) the court observed '[i]t is urged that the sale, a local transaction, is fully completed be-

fore any interstate commerce begins. . . . But where commodities are bought for use beyond state lines, the sale is a part of interstate commerce." See also, *Furst v. Brewster*, 282 U.S. 493 (1931).

Justice Holmes often explained that interstate commerce "is not a technical legal conception but a practi-
[fol. 18] cal one, drawn from the course of business."[8] Having reviewed the course of the cotton business, Congress declared as a matter of public policy that "[c]otton is the basic natural fiber of the Nation. It is produced by many individual cottongrowers throughout the various cotton-producing States of the Nation. Cotton moves in a large part in the channels of interstate and foreign commerce and such cotton which does not move in such channels directly burdens or affects interstate commerce in cotton and cotton products. All cotton produced in the United States is in the current of interstate or foreign commerce or directly burdens, obstructs or affects interstate or foreign commerce in cotton and cotton products." 7 U.S.C.A. § 2101. As a legislative finding, Congress has also determined that "American cotton is a basic source of clothing and industrial products used by every person in the United States and by a substantial number of people in foreign countries. American cotton is sold in a worldwide market and moves from the places of production almost entirely in interstate and foreign commerce to processing establishments located throughout the world. . . ." 7 U.S.C.A. § 1341.

There is no significant amount of cotton milling in Mississippi:[9] ours is a cotton producing state. As a

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[8] **Swift & Co. v. United States**, 196 U.S. 375, 398 (1905); see also, **Eureka Pipe Line Co. v. Hallaman**, 257 U.S. 265 (1921).

[9] U.S. Department of Agriculture, Supplement for 1972 to Bulletin No. 417—Statistics on Cotton and Related Data, 1930-67, p. 58-77.

[fol. 19] practical matter in the cotton industry, Mississippi cotton almost invariably has an out-of-state destination.

F. APPLICATION OF THE LAW

Applying clear Congressional declarations of policy and what we regard as the controlling precedent expressed in *Dahnke-Walker*, *supra*, we hold that the interstate character vel non of these particular transactions must be judged in light of the recognized course of the cotton business. If, in view of the cotton trade and the relevant facts, it can be shown that the cotton was bought for the purpose of interstate shipment, then the transaction is one in interstate commerce and, by virtue of Mississippi law itself, the plaintiffs are not barred from this court. The fact that, as to the defendants, the transactions were completed in Mississippi, or that the cotton might have been diverted intrastate, or that the cotton temporarily came to rest in Mississippi before being loaded on board carriers cannot alter the nature of a transaction otherwise in interstate commerce.

As in *Dahnke-Walker*, the contracts in these cases were negotiated and executed in the forum state, the commodity was to be delivered by the seller and paid for by the buyer in Mississippi, and the commodity involved was one of nationwide and worldwide importance. The delivery was to be made either on board a truck or at a gin from whence the commodity would be removed once trucks became available.

In *Cone*, as in *Dahnke-Walker*, the commod-
[fol. 20] ity was to be transported beyond state lines for the use of the purchaser in the operation of its own mills, and is thus a transaction in interstate commerce. Allenberg does not purchase cotton for its own use, but for resale to others. In *Allenberg*, according to the general practice of the industry, the commodity became a part of interstate commerce when it was purchased by Allenberg.

These particular transactions did not constitute doing business in Mississippi for the purposes of the penalty statute because they are exempt transactions under the interstate commerce exception adopted by the Mississippi Legislature. Accordingly, the motions to dismiss are not well taken.

* * *

CONCLUSION

Appropriate orders will be entered in both
[fol. 25] actions to effectuate the holdings of the court as herein set forth.

Dated, this the 10th day of January, 1974.

/s/ Orma R. Smith
UNITED STATES DISTRICT JUDGE

Supreme Court, U. S.
FILED
FEB 23 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-628

ALLENBERG COTTON COMPANY, INC.,
Appellant,

v.

BEN E. PITTMAN,
Appellee.

On Appeal from the Supreme Court of the State of Mississippi

MOTION TO REVIEW AND RESCIND ORDER OF DECEMBER 17, 1973

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Appellee

On Appeal from the Supreme Court of the State of Mississippi

MOTION TO REVIEW AND RESCIND ORDER OF DECEMBER 17, 1973

Appellant, Allenberg Cotton Company, Inc., herewith moves the Court to review and rescind its order of December 17, 1973, which order provides:

> Consideration of the jurisdictional statement is deferred to accord counsel for appellant opportunity to secure a certificate from the Supreme Court of Mis-

sissippi as to whether the judgment herein was intended to rest on an adequate and independent state ground or on federal grounds. ***Charleston Federal Savings & Loan Association, et al v. Alderson, State Tax Commissioner***, 324 U.S. 182, 186 n. 1 (1945).

Appellant, Allenberg, contends that this determination is unnecessary.

In this appeal Allenberg Cotton Company argues that the burdensome effect of the decision of the Mississippi Supreme Court violates the Commerce Clause. It is the effect of the Mississippi decision which is challenged, not the particular reasoning of the Mississippi Supreme Court. Appellant Allenberg respectfully contends that whether or not the Mississippi Supreme Court states there was an independent state ground for the decision, the decision would nevertheless be subject to challenge on the ground that its effect will place an undue burden on interstate commerce in violation of the Commerce Clause.

This Court stated in ***Corn Products Refining Co. v. Eddy***, 249 U.S. 428, at 432 (1919):

> We turn to the questions raised under the commerce clause and the act of Congress.
>
> Although the supreme court in its opinion said nothing about interstate commerce, it cannot be doubted, in the state of the record, that defendants' activities against which relief was sought included incidental interference with plaintiff's interstate commerce in the "Mary Jane" syrup; and that the general judgment in favor of defendants amounts to an adjudication that the state law and regulations are to be enforced with respect to plaintiff's product indiscriminately, not only when sold and offered for sale in domestic commerce, but also while in the hands of the importing

> dealers for sale in the original packages, and hence, in contemplation of law, still in the course of commerce from state to state. The silence of the supreme court upon the subject cannot change the result in this regard. In cases of this kind, we are concerned not with the characterization or construction of the state law by the state court, nor even with the question whether it has in terms been construed, but solely with the effect and operation of the law as put in force by the state.

The Court then went on to consider the Commerce Clause question in the ***Corn Products*** case.

Under ***Corn Products*** it would appear unnecessary to raise the Commerce Clause question below. However, it is not necessary for this Court to so hold in this case because Allenberg has obtained a certificate from the Mississippi Supreme Court which states that arguments relating to the Commerce Clause were made and considered in the state court. In his Motion to Dismiss or Affirm (page 5), Pittman (Appellee) argues that the certificate obtained is not the certificate of the state court, but is merely the certificate of the Chief Justice of the Mississippi Supreme Court and for that reason does not comply with the requirements of ***Herb v. Pitcairn***, 324 U.S. 117, 128 (1945). However, the certificate obtained shows on its face that it is the certificate of the Mississippi Supreme Court and not merely that of one Justice. The certificate states: "On application of the appellee, Allenberg Cotton Company, Inc., ***this Court***, in addition to the orders made herein, ***hereby certifies*** and makes a part of the record in this case. . ." Jurisdictional Statement, p. A 12.

Therefore, there should be no need to return to the Mississippi Supreme Court for further clarification of the certificate.

Alternatively, for the reasons set out above, in an appeal raising a Commerce Clause question, the rule of ***Herb v. Pitcairn***, ***supra***, does not apply. ***Herb v. Pitcairn*** applies only in that class of cases where it is necessary to show that the necessary ground for the decision was an interpretation of federal constitutional law. In Commerce Clause cases such a showing is unnecessary because it is the unconstitutional effect of the decision which is challenged, not the reasoning of the court below.

CONCLUSION

For the foregoing reasons the appellant Allenberg respectfully requests this Court to review its order of December 17, 1973, and to rescind it.

Respectfully submitted,

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APPENDIX

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-628

ALLENBERG COTTON COMPANY, INC.,
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Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DOCKETED AUGUST 8, 1973
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SUPREME COURT OF THE STATE OF MISSISSIPPI

Record No. 47,037

Chancery Court, Quitman County, Mississippi

Ben E. Pittman

v.

Allenberg Cotton Co.

Filed: May 25, 1972

Julia H. Kendrick, Clerk

Yvonne P. Burnham, D.C.

Arg. & Sub. 3/12/73

Rev. & Decree here for appellant.

4/16/73 BO 181

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IN THE CHANCERY COURT OF QUITMAN COUNTY, MISSISSIPPI

ALLENBERG COTTON COMPANY
Complainant

Versus NO. 7642

BEN E. PITTMAN
Defendant

[fol. 2] **APPEARANCES**

FOR:
ALLENBERG COTTON COMPANY — Maynard, Fitzgerald and Maynard, Clarksdale, Ms 38614

FOR:
BEN E. PITTMAN — Ellen E. Goldman Marks, Ms 38646

[fol. 3] **IN THE CHANCERY COURT OF QUITMAN COUNTY, MISSISSIPPI**

FEBRUARY TERM 1972

BE IT REMEMBERED that the Chancery Court of Quitman County, Mississippi convened in Regular Session on this the 14th day of February 1972 and being the second Monday of February 1972 at 9 o'clock A.M. pursuant to Law.

The COURT having convened pursuant to law, there being present the HONORABLE PARTEE L. DENTON, Chancellor; L. Q. Brunt, Sheriff; James A. Martin, Clerk of the Chancery Court; Joyce M. Lanham, Court Reporter and the COURT having been opened by due proclamation of the Sheriff the following proceedings were had and conducted, to-wit: * * *

FILED: NOVEMBER 10, 1971
James A. Martin, Chancery Clerk
By: J.A.M. D.C.

[fol. 5] Complainant would show that it is desirous of purchasing said cotton in order to fulfill its obligations.

5) Complainant believes that these defendants may be insolvent and if the cotton is not delivered according to the terms of the contract there exists no remedy for the relief of complainant.

6) That justice demands that the complainant be awarded a bill of discovery in order that the amount of cotton, the location thereof, the grade and value, together with the location of the warehouse receipts thereon may be revealed to the complainant, as the defendant has refused to co-operate with the complainant in providing the required information and honoring said contract of purchase between them. That these are material and relevant matters which are exclusively within the knowledge or within the power or custody of the defendant, and which is not within the reasonable reach of the complainant to obtain without the aid of the discovery as prayed for therein. The determination of the above facts are indispensible to the ends of full and exact justice, and such information must be made available to the complainant and the Court in order that the rights of the parties herein may be obtained.

WHEREFORE, PREMISES CONSIDERED, complainant prays that said defendant be summoned and required to answer this bill on the nineteenth day of November, 1971; and that upon a final hearing thereof the complainant be awarded the following relief to-wit:

A. That defendant be enjoined from selling and delivering his cotton to any other party or firm;

B. That the Court order the defendant to proceed with the same and delivery of his cotton to complainant as provided in the written agreement;

C. That the defendant be ordered to pay for damages sustained by the complainant for the defendants having failed to deliver and sell and required by his legal obligation;

D. That the Complainant be granted a bill of discovery in order that the amount of cotton produced, the class, location, grade, and value of said cotton, together with the location of the warehouse receipts thereon may be revealed to the complainant.

E. That defendant be taxed with all cost herein.

And complainant now prays for general relief.

MAYNARD, FITZGERALD, MAYNARD & BRADLEY

/s/ William R. Bradley
Attorney for Complainant

[fol. 6] (Jurat omitted in printing)

[fol. 7]

SALE AND PURCHASE AGREEMENT

1971-1972

Buyer: Allenberg Cotton Company
104 S. Front Street, P O Box 254
Memphis, Tennessee 38101

Pur. # ABC-6
Agents:

Sale and Purchase Agreement

THIS CONTRACT made and entered into this day by and between BEN E. PITTMAN of MARKS, MISSISSIPPI hereinafter referred to as Producer and Seller, and ALLENBERG COTTON CO. of MEMPHIS, TENN. hereinafter referred to as Buyer:

WITNESSETH:

1. On the terms and conditions and at prices hereinafter stated, the Producer and Seller agrees to sell, and the Buyer agrees to buy, all and only the cotton produced by Producer and Seller during the crop year 1971 on approximately 700 acres situated in QUITMAN COUNTY, MARKS, MISSISSIPPI.
Variety: 1/2 Stoneville 213, 1/2 DPL-16

2. This contract is for the sale and purchase of all cotton produced on the above-described acreage eligible for the 1971 Government loan as determined by USDA official Government class (original USDA official Government Class to be final.)

EXCEPT: BELOW GRADES AND THEY WILL BE AT 15¢ and cotton picked up from the ground by machine or otherwise and stripper cotton; also, any false-paced, water-packed, re-packed, reginned or oily cotton.

Cotton reduced in class on account of grass, or other extraneous matter, shall be AT 100 POINTS OVER GOVERNMENT LOAN, NET WEIGHTS.

All cotton eligible under this contract must be hand or spindle picked and must be ginned on VALLEY GIN CO at MARKS, MISSISSIPPI and delivered to FEDERAL COMPRESS & WHSE CO AT MARKS, MISSISSIPPI by _____ (date of warehouse receipt to govern/) Any changes in these ginning and storage provisions must be agreed to in writing between Producer and Seller's account.

Sale and Purchase Agreement

3. Producer and Seller agrees to practice normal, good farming methods in the production and harvesting of the crop, to defoliate before machine picking and to harvest, gin and store as fast as practicable after maturity.

Buyer has the privilege of controlling within reason the amount of heat and cleaning equipment to be used in ginning the cotton. Producer and Seller agrees further to cooperate in harvesting, handling and ginning the cotton, to avoid overheating, overmachining and poor preparation.

[fol. 8] 4. The price shall be 3.3 to 5.0 MICRONAIRE AT 21.00¢ , 2.0 AND LOWER MICRONAIRE AT 100 POINTS OVER GOVERNMENT LOAN NET WEIGHTS. DECEMBER 1, 1971 CUTOFF DATE. ALL COTTON AFTER DECEMBER 1, 1971 SHALL BE AT 100 POINTS OVER GOVERNMENT LOAN, NET WEIGHT, net compress receiving weights at warehouse location with compress receiving and storage charges deducted to date of invoice. Other terms, Memphis Cotton Exchange rules.

In case of loss prior to the time cotton comes under the insured warehouse receipt cover, losses are to be reported to the Buyer but settlement shall be between the Producer and Seller and his gin or farm insurer, with no further obligation to the Buyer.

5. On cotton covered by this contract, one set of samples is to be sent at Producer's and Seller's expense direct from the Compress to USDA Classing Office for Smith-Doxey class; and one set is to be sent, transportation charges collect, direct from the Compress to ALLENBERG COTTON CO. 104 S. Front St. at Memphis, Tenn.

6. Should the Producer and Seller or the Buyer fail or refuse to comply with this contract, the other party shall promptly take necessary legal action to enforce the contract.

7. We, the Producer and Seller and the Buyer, have carefully read and fully understand the terms and provisions of the foregoing contract, which represents the entire agreement between the parties, and understand further that there may be no modification of this agreement except in writing.

WITNESS our signatures in triplicate original this the 28 day of January 1971.

Printed BEN E. PITTMAN
Producer and Seller

/s/ Ben E. Pittman

ALLENBERG COTTON CO.
BUYER

/s/ Jerry L. Hill

APPROVED AND ACCEPTED:

ALLENBERG COTTON COMPANY

By /s/ Jerry L. Hill

DATE January 28, 1971

(Copy of Contract)
(exhibit to original petition)

[fol. 9]

SUMMONS-CHANCERY COURT NO 7642
QUITMAN COUNTY

IN CHANCERY COURT

TO THE SHERIFF OF QUITMAN COUNTY IN SAID STATE:

You are hereby commanded to summon Ben E. Pittman, if to be found in your county, to appear before the Chancery

Court of the County of Quitman in the State of Mississippi, at a vacation term of said court to be held on the nine o'clock A.M. the nineteenth of November, 1971, at the courthouse in the City of Clarksdale, Mississippi, then and there to plead, answer, or demur to the Bill of Complainant of Allenberg Cotton Co. to which he is defendant. And have there and then this writ.

Given under my hand and seal of said Court, and issued this the tenth day of November, A.D., 1971.

/s/ James A. Martin
_____ D.C.

SEAL

[fol. 10]

FILED NOVEMBER 10th, Day, 1971

I have this day executed the within writ on Ben E. Pittman the within named defendant, by leaving a true copy of the same at his usual place of abode in Quitman County, Mississippi, with Patsy H. Pittman, his wife, a member of his family above the age of sixteen years, and willing to receive such copy. The said defendant not found in my County.

This the fifteenth day of November, 1971.

/s/ L. V. HARRISON
SHERIFF

[fol. 11]

IN THE CHANCERY COURT OF QUITMAN COUNTY, STATE OF MISSISSIPPI

FILED NOVEMBER 19, 1971
James A. Martin, Chancery Clerk
By J.A.M. D.C.

(Title omitted in printing)

MOTION FOR BILL OF PARTICULARS

TO THE HONORABLE CHANCERY COURT OF QUITMAN COUNTY, MISSISSIPPI:

Comes now Ben E. Pittman, defendant in the above-styled and numbered cause, and by his attorney, Ellen E. Goldman, respectfully moves the Court for a Bill of Particulars in which the complainant be required to furnish the defendant the following, to-wit:

1.

In Paragraph III of the Bill of Complaint, complainant states that the complainant and defendant entered into a written agreement in Memphis, Tennessee on January 28, 1971. It is necessary for the defense of this lawsuit that the complainant furnish the defendant with some details about the allegations that the subject contract was made in Memphis, Tennessee on January 28, 1971, as nothing on the face of the contracts indicates such and nothing within the knowledge of the defendant indicates that it was. The knowledge is entirely in control of the complainant and material and relevant to adequate defense.

Respectfully submitted,

/s/ Ellen E. Goldman
Attorney for Defendant

[fol. 12] (Jurat omitted in printing)

[fol. 13] (Certificate of service omitted in printing)

[fol. 14]

IN THE CHANCERY COURT OF QUITMAN COUNTY, MISSISSIPPI

(Title omitted in printing)

DECREE

This cause coming on this day to be heard on motion of complainant for temporary injunction against defendant, Ben E. Pittman, as set forth in bill of complaint of complainant in this cause, and both parties appearing in Court and being represented by counsel, and the Court having considered the same is of the opinion that said temporary injunction should be granted on complainant's entering into bond of $8,500.00 payable according to law;

It is, therefore, hereby adjudged, ordered and decreed that the motion of complainant, Allenberg Cotton Company, in the above styled cause for temporary injunction against defendant, Ben E. Pittman, be and the same is hereby, sustained, and that defendant, Ben E. Pittman, his heirs and assigns, be, and they are hereby, enjoined from selling or delivering the cotton as described in the contract made an exhibit to bill of complaint to any other party other than the complainant until further order of this Court.

It is further hereby adjudged, ordered and decreed that said injunction shall not go into effect until complainant has entered into bond as provided by law, and this decree.

It is further adjudged, ordered and decreed that the defendant, Ben E. Pittman, provide the discovery asked for in the prayer of the complaint, and specifically provide to the complainant information as to the following:

1.) The number of bales produced on the land in question:

2.) Class and grade and value of said cotton:

3.) Location of said bales of cotton and the location of the warehouse receipts and class cards in connection therewith.

ADJUDGED, ORDERED AND DECREED, on this the 19th day of November, 1971.

/s/ Partee L. Denton
Chancellor

[fol. 15] FILED NOVEMBER 23, 1971
James A. Martin, Chancery Clerk
By J.A.M. D.C.

BOND

KNOW ALL MEN BY THESE PRESENTS, that the undersigned Allenberg Cotton Company, a Tennessee corporation, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Ben E. Pittman, of Quitman County, Mississippi, in the sum of Eight Thousand Five Hundred and no/100 ($8,500.00) Dollars, to be paid to the said Ben E. Pittman, his executors, administration or assigns, for the payment well and truly to be made, the undersigned bind themselves, their successors and assigns firmly by these presents.

WHEREAS, on November 19, 1971, the Chancery Clerk Court of Quitman County, Mississippi, granted the undersigned a temporary injunction against Ben E. Pittman in

that certain cause appearing as No. 7642 in the Chancery Court of Quitman County, Mississippi, enjoining him, his heirs and assigns, from selling certain cotton until further order of the Court.

NOW THEREFORE, the condition of this obligation is such that if the above bounden Allenberg Cotton Company, its successors and assigns, or any of them shall pay all damages and cost which may be awarded against Allenberg Cotton Company, or which Ben E. Pittman may suffer or sustain by reason of the suing out of said injunction, in case the same shall be dissolved, then this obligation shall be void; otherwise, to remain in full force.

IN WITNESS WHEREOF, we have hereto set our hands on this the 19th day of November, 1971.

ALLENBERG COTTON COMPANY
BY WILLIAM H. MAYNARD
WM. H. MAYNARD AGENT IN FACT
BY Written power of attorney
PRINCIPAL

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND

/s/ O. Johnson, Jr.
SURETY

[fol. 16] NOVEMBER 19, 1971

Hon. Wm. H. Maynard
Maynard, Fitzgerald, Maynard & Bradley
Attorneys at Law
Clarksdale, Mississippi

A. 14

Answer

Dear Sir:

This is to authorize you for and on behalf of Allenberg Cotton Company to sign our name as principal with you as agent, to an $8,500.00 bond as required by decree of Chancellor Partee L. Denton, on November 19, 1971 in Chancery Cause no 7642, Chancery Court of Coahoma County, Mississippi.

ALLENBERG COTTON COMPANY

BY: /s/ W. D. Crawford
W. D. CRAWFORD, SECRETARY

[fol. 17]

IN THE CHANCERY COURT OF QUITMAN COUNTY, MISSISSIPPI

(Title omitted in printing)

ANSWER TO AMENDED BILL OF COMPLAINT AND DECREE OF DISCOVERY

A. ANSWER TO BILL OF COMPLAINT AS AMENDED

1. RESPONSE TO AMENDED BILL:

1.

Defendant admits Paragraphs 1 of the Bill of Complaint.

2.

Defendant admits the allegations of Paragraph 11 of the bill of complaint.

A. 15

Answer

3.

Defendant admits that he and complainant signed a written contract in Marks, Mississippi, on January 28, 1971, but denies mention in his presence or on the face of the contract that it had been approved in Memphis, Tennessee, and such approval was necessary for the validity of said agreement, as set out in Paragraph 111 of the Bill of Complaint, as amended.

4.

Defendant in answer to Paragraph IV of the Bill of Complaint admits that harvest of cotton is underway and that he has delivered cotton to the warehouses, but denies that the subject contract binds him to pay any specific date of fulfillment.

5.

Defendant, in response to Paragraph V of the Bill of Complaint, denies that he is insolvent.

11. ANSWER TO DECREE FOR DISCOVERY

1.

In answer to the decree for discovery, item No. 1, the defendant produced 534 bales of cotton on land in question.

2.

The class cards are being gathered and the defendant will turn over to the complainant the ones he has in his possession at 10:00 on November 25th, 1971, in Chancery Court in Clarksdale, Mississippi. The defend-
[fol. 18] ant is not sure what "the value of the cotton" means in Item 11 of the decree. He sold the

cotton on November 9th, 1971, to Delta Cotton Co. in Greenwood, Mississippi, at 28.90 less commission.

3.

Location of the bales requested in Item 111 of decree was Federal Compress in Marks and Sledge, Mississippi, on November 9, 1971.

Location of the warehouse receipts has not been in the knowledge of the defendant since November 9, 1971. He turned the receipts over to Delta Cotton Co., in Greenwood, at that time.

111. AFFIRMATIVE DEFENSES

AND NOW HAVING FULLY ANSWERED the allegations contained in the amended Bill of Complaint and provided the complainant with the decreed discovery, the defendant Ben E. Pittman, by way of affirmative defense against complainant says

1.

Defendant affirmatively states to the Court that the Allenberg Cotton Company of Memphis, Tennessee, a Tennessee corporation, is a foreign corporation doing business in the State of Mississippi and it is not qualified to do business in the State of Mississippi as required by S5309-221 of the Mississippi Code of 1942 Annotated. In this regard the defendant attaches hereto an exact copy of a certificate of non-certification of the Allenberg Cotton Company from the Office of the Secretary of State of Mississippi which is Exhibit "A" hereto and attached and asks that it be made a part hereof as though fully written herein.

11.

Defendant also affirmatively states that the Allenberg Cotton Company, as complainant, filed suit No. 7639 against the defendant in the Chancery Court of Quitman County, Mississippi on November 1, 1971, for the delivery of his cotton under subject contract, a copy of which bill is attached hereto as Exhibit "B" and made part hereof.

On November 5, 1971, defendant made a motion that the suit be dismissed on the grounds that the Complainant was not qualified to do business in the State of Mississippi and could not therefore, use the Courts of Mississippi to enforce its contracts. A copy of the defendant's motion is attached hereto and made a part hereof by references and marked Exhibit "C". The complainant thereafter by its own motion, a copy of [which] is Exhibit "D"
[fol. 19] to this answer, has the Court to dismiss its Bill of Complaint. The order for dismissal is attached hereto and made a part hereof and marked Exhibit "E". The defendant affirmatively states that the complainant's dismissal of its own suit indicates that it was doing business in the State of Mississippi as an unqualified foreign corporation.

WHEREFORE, PREMISES CONSIDERED, defendant having fully answered and provided complainant with discovery demands and moves that the Bill of Complaint as amended be dismissed except for the information, injunctive relief and discovery which have been decreed, with cost to the complainant on the following ground.

1. That complainant is doing business in the State of Mississippi without having qualified to do so according to S5309-221 of the Mississippi Code of 1942 Annotated and

therefore not entitled to use the courts of the State of Mississippi as set out in S5309-221 of the Mississippi Code of 1942 Annotated.

/s/ Ellen E. Goldman
Attorney for Defendant

(Jurat omitted in printing)

[fol. 20] **EXHIBIT "A"**

STATE OF MISSISSIPPI
OFFICE OF
SECRETARY OF STATE
JACKSON

CERTIFICATE

I, Heber Ladner, Secretary of State of the State of Mississippi, and as such legal custodian of the corporate records, required by the laws of Mississippi, to be filed in my office, do hereby certify that I have made a diligent search in my office for the record and copy of the charter of articles of incorporation, or certificate of incorporation, of Allenberg Cotton Company, a corporation, authorized by law for the filing of such charter or articles of incorporation, or certificate, and there cannot be found therein, or on file in my office, any paper or record to the charter or articles of incorporation, or certificate of incorporation, of Allenberg Cotton Company, a corporation, or any record of any fees paid by said corporation for the filing of said charter or articles of incorporation, or certificate.

I further certify that I have made diligent search in my office for the records and papers relating to the appointment, by the aforementioned corporation, of the Secretary of State, or in lieu thereof an agent upon whom service of process may be had in the event of any suit against said corporation, as authorized by the laws of Mississippi, and there cannot be found therein, or on file in my office, any paper relating to the appointment, by the aforementioned corporation of the Secretary of State, or in lieu thereof an agent upon whom service of process may be had.

/s/ Heber Ladner
Secretary of State of the State
Of Mississippi

Witness my hand and seal of office, this the 4th day of November, 1971

SEAL

[fol. 21] **EXHIBIT "B"**

**IN THE CHANCERY COURT OF
QUITMAN COUNTY, MISSISSIPPI**

(Title omitted in printing)

FILED NOVEMBER 1, 1971
James A. Martin, Chancery Clerk
By J.A.M. D.C.

BILL OF COMPLAINT

TO THE HONORABLE CHANCERY COURT OF THE COUNTY AFORESAID:

Exhibit B to Answer

Comes now the complainant, Allenberg Cotton Company, and shows unto the Court the following, to-wit

1) That said Allenberg Cotton Company is a Tennessee corporation authorized to do business in the State of Mississippi, and that the defendant, Ben E. Pittman is an adult resident citizen of Quitman County, Mississippi, whose home address is Marks, Mississippi.

2) The defendant is and has been a farmer engaged in raising cotton in Quitman County, Mississippi, and was so engaged at the time of the execution of a written agreement with complainant, a copy of which is attached hereto and made a part of this petition.

3) The complainant and defendant entered into the written agreement made an Exhibit to this petition on January 28, 1971, wherein complainant agreed to purchase and defendant agreed to sell all cotton produced on approximately 700 acres situated in Quitman County, Mississippi, under the terms and conditions as set forth in this contract.

Complainant would show that contrary to the terms of the contract, the defendant is now harvesting the cotton crop grown on his acreage as described in the contract, but contrary to the provisions of the agreement has refused and does refuse to deliver the cotton to complainant although complainant has complied with all terms and conditions of the agreement.

Complainant has required of the defendant that the cotton be delivered as provided in the agreement, but has been advised and believes that the defendant producer does not intend to and will not sell nor deliver his cotton to the complainant.

Exhibit B to Complaint

4) Complainant would show that harvest of the cotton is well under way, that the cotton is being delivered to the warehouse for storage and that the time for fulfillment of the agreement has begun and complainant stands ready and willing to purchase said crop as agreed.

[fol. 22]

Complainant would show that it is desirous of purchasing said cotton in order to fulfill its obligations.

WHEREFORE, PREMISES CONSIDERED, complainant prays that said defendant be summoned and required to answer this Bill on the eighth day of November, 1971; and that upon a final hearing thereof the complainant be awarded the following relief, to-wit:

A. That defendant be enjoined from selling and delivering his cotton to any other party or firm;

B. That the Court order the defendant to proceed with the sale and delivery of his cotton to complainant as provided in the written agreement;

C. That the defendant be ordered to pay for damages sustained by the complainant for the defendants having failed to deliver and sell as required by his legal obligations.

D. That defendant be taxed with all cost herein.

And complainant now prays for general relief.

MAYNARD, FITZGERALD, MAYNARD & BRADLEY:

BY /s/ Wm. H. Maynard
ATTORNEYS FOR COMPLAINANT

(Jurat omitted in printing)

[fol. 23] **EXHIBIT "C"**

IN THE CHANCERY COURT OF QUITMAN COUNTY, MISSISSIPPI

FILED NOVEMBER 5, 1971
James A. Martin, Chancery Clerk
By P.C. D.C.

(Title omitted in printing)

MOTION TO DISMISS

TO THE HONORABLE CHANCERY COURT OF THE COUNTY AFORESAID:

Comes now the defendant, Ben E. Pittman, and moves the Court to dismiss the Bill of Complaint in the above styled and numbered cause for the following cause, to-wit.

The Allenberg Cotton Company of Memphis, Tennessee, is not qualified as a foreign corporation to do business in Mississippi as required by statute, and Section 5309-239 of the Mississippi Code of 1942, Annotated states that a foreign corporation doing business in Mississippi without having qualified as required by statute cannot use the Courts of this State to enforce any cause of action that accrued as a result of doing such business.

A copy of a certificate of non-certification of the Allenberg Cotton Company is attached hereto as Exhibit "A" to this motion and made a part hereof by incorporation by reference.

/s/ Ellen E. Goldman
ELLEN GOLDMAN
ATTORNEY FOR DEFENDANT

[fol. 24] **EXHIBIT "D"**

IN THE CHANCERY COURT OF QUITMAN COUNTY, MISSISSIPPI

FILED NOVEMBER 8, 1971
James A. Martin, Chancery Clerk
By P.C. D.C.

(Title omitted in printing)

MOTION TO DISMISS WITHOUT PREJUDICE

Comes now the Complainant, Allenberg Cotton Company, in the above styled and numbered cause by and through its attorney Maynard, Fitzgerald, Maynard & Bradley, and moves the Court to dismiss the above cause of action without prejudice, and at its cost.

ALLENBERG COTTON COMPANY
BY
MAYNARD, FITZGERALD, MAYNARD & BRADLEY

BY /s/ O. L. GARMON III

[fol. 25]

EXHIBIT "E"

IN THE CHANCERY COURT OF QUITMAN COUNTY, MISSISSIPPI

(Title omitted in printing)

ORDER OF DISMISSAL WITHOUT PREJUDICE

Compiainant having made a motion to dismiss the above cause of action without prejudice, and at its cost, and the Court having considered the matter does hereby dismiss said cause of action without prejudice at the cost of the complainant.

ORDERED, ADJUDGED and DECREED on this the ninth day of November, 1971.

/s/ Partee L. Denton
Chancellor

[fol. 26]

IN THE CHANCERY COURT OF QUITMAN COUNTY, STATE OF MISSISSIPPI

(Title omitted in printing)

WAIVER OF FORMAL NOTICE OF FILING OF INTERROGATORIES AND FORMAL SERVICE OF COPIES OF INTERROGATORIES

COMES NOW the undersigned attorney of record for complainant, Allenberg Cotton Company, and hereby acknowledges receipt of a true and correct copy of the above and foregoing Interrogatories propounded to said complainant by defendant, and hereby waives formal notice of the filing of said interrogatories and waives formal service of a copy of said interrogatories upon the undersigned as attorney of record for said complainant.

This the 26th day of November, 1971.

/s/ Wm. H. Maynard

FILED NOVEMBER 29th, 1971
James A. Martin, Chancery Clerk
By J.A.M. D.C.

[fol. 27]

ELLEN E. GOLDMAN
Attorney at Law
231 Chestnut Street
Marks, Mississippi 38646
326-8688
P.O. Bx 88

December 6, 1971

FILED
DECEMBER 7, 1971
James A. Martin, Chancery Clerk
By J.A.M. D.C.

Mrs. Edward L. Lanham
427 Elm
Clarksdale, Mississippi

In Re: Allenberg Cotton Co.
7643 H. T. Pittman and also
Allenberg Cotton Co.
7642 Ben E. Pittman

Dear Mrs. Lanham:

You are hereby requested and directed to transcribe your notes and file them with the Clerk of the Court, as provided by law, in the above styled and numbered cause, as H. T. Pittman and Ben E. Pittman desire to prosecute an appeal from a decree by the Chancellor of the Court of Quitman County, on the 26th day of November, 1971, regarding preliminary hearing on the matter of whether the Allenberg Cotton Company was "doing business in the State of Mississippi."

Yours very truly,

/s/ Ellen E. Goldman
Attorney

(Certificate of service omitted in printing)

cc: Mr. William Maynard
Attorney at law
Steven Building
Clarksdale, Mississippi

[fol. 31; Tr. p. 1]

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IN THE CHANCERY COURT OF QUITMAN COUNTY, MISSISSIPPI

(Vacation)

(Title omitted in printing)

TRANSCRIPT

This cause came on to be heard in Vacation at 10:00 o'clock A.M. Friday, November 26th, 1971, at the Coahoma County Courthouse in Clarksdale, Mississippi. Present and presiding was the Honorable Partee L. Denton, Chancellor for the Seventh Chancery Court District, Place Two, of Mississippi. The oral testimony and documentary evidence offered during the hearing is contained in this transcript.

[fol. 34; Tr. p. 2]

APPEARANCES:

For the Complainant: Hon. Billy Maynard
Maynard, Fitzgerald, Maynard & Bradley
Attorneys at Law
Clarksdale, Mississippi

Hon. William R. Bradley
Maynard, Fitzgerald, Maynard & Bradley
Attorneys at Law
Clarksdale, Mississippi

For the Defendant: Mrs. Ellen E. Goldman
Attorney at Law
Marks, Mississippi

[fol. 35; Tr. p. 3]

BY THE COURT:

This case was called - process was made returnable and the parties appeared before the court a week ago today on the 19th of November, 1971. No pleadings had been filed and the case was continued to date, on the statement, if I recollect correctly that H. T. Pittman had become ill and had to leave the Court. Now, today, Mr. Pittman, the defendant has filed an answer and set out an affirmative defense and filed interrogatories. I believe that's the status of the pleadings.

BY MRS. GOLDMAN:

The interrogatories have been answered and if it's in order, I would like for you to mark them as being filed.

BY THE COURT:

The clerk is not here and the clerk of this county is not the clerk of Quitman County. Coahoma County is taking today, the Friday after Thanksgiving, as a holiday. I will mark the answers to the interrogatories filed. I want the solicitors to see that it's entered on the docket to show that it was filed by me today.

BY MR. MAYNARD:

We will, today, send it to the chancery clerk of Quitman County, Mississippi, indicating that Your Honor, has marked it filed and that the Clerk of said Chancery Court to likewise mark it filed in his office.

BY THE COURT:

Let the record also show that contemporaneously with the filing, there's been answers to the interrogatories - copies of the answers, served on solicitor for the defendant.

[fol. 36; Tr. p. 4]

BY MR. MAYNARD:

Now, Your Honor, one question of necessity has to be decided before we're into the merits—even with the in-

junction, would be the question that is raised by Mrs. Goldman, that Allenberg Cotton Company, the Complainant in this case, has no legal right to bring this suit in Mississippi. We are prepared to introduce evidence and to argue at this time on this question.

BY THE COURT:

I believe that might be classified as a plea in abatement and if it should develop that a complainant cannot come into this court to seek relief, that would dispose of the case. So I believe we can proceed on that phase of the answer.

BY MR. BRADLEY:

Judge, I believe this should apply to both cases which are now pending before the Court, because the proof will be the same in each case.

BY MRS. GOLDMAN:

Your Honor, I object to that, because the interrogatories are different and the proof in the Ben E. Pittman case will be made by Mr. Ben E. Pittman himself and in the H. T. Pittman case, Mr. H. T. Pittman had no dealings with the agents of Allenberg Cotton Company.

BY THE COURT:

I judge, that what you are referring to there is the issue that you've raised in the H. T. Pittman case, is that H. T. Pittman did not sign the contract, nor did he authorize it to be signed by his son,

[fol. 38; Tr. p. 5]

Ben E. Pittman, nor has he ratified it, and some other things in that connection alleged in the affirmative defense. I believe that goes to the merits and seems to me that the question of whether or not the complainant, Allenberg Cotton Company is a non-resident corporation, not qualified to do business in Mississippi, but yet doing business in Mississippi, is pertinent to both cases and I think on that particular issue, as distinguished from the issue of

whether or not the contract was signed with or without authority, or by whom, should be separated for the purposes of this hearing. I don't want to put anybody to any unnecessary trouble, but I think that if the proof is the same I don't understand why it shouldn't be consolidated and from your statement, I don't understand why the proof wouldn't be the same on the issue of whether or not Allenberg Cotton Company is entitled to resort to this Court for relief.

BY MRS. GOLDMAN:

The proof would not be the same, because in the Ben E. Pittman case, Mr. Ben E. Pittman, Mr. Ben E. Pittman, did what we think, constitutes business with Allenberg Cotton Company, in Marks, Mississippi. He participated in this. He was approached by representatives and agents of the Allenberg Cotton Company and Mr. H. T. Pittman was not. So the two cases are different in proof on this matter.

[fol. 38; Tr. p. 6]

BY THE COURT:

I won't force it, but it looks to me like you are probably taking an unnecessary amount of time to require the proof on this issue to be put on twice. We will proceed on the H. T. Pittman case.

BY MRS. GOLDMAN:

Your Honor, I would like to say that this hearing is for injunctive relief and I feel that before we raise our defense, that the burden is on the complainant to show that he is entitled to injunctive relief on the basis that he has complained it in this bill of complaint. He claims that Mr. Pittman is insolvent and it is on this basis that he has brought us into Court this morning and I feel that we should first of all show that he has raised a proper issue for a

hearing of any sort.

BY MR. MAYNARD:

If the Court please, with reference to your plea, Mrs. Goldman, with reference to Mr. Ben Pittman not being an agent is an affirmative plea, so I think that in order to proceed according to both law and equity, the burden is on you. We've alleged that it's a legal contract and that he did not deliver. But the first thing, Your Honor, is the question of whether we've got a right to sue.

BY THE COURT:

I think we'll proceed on the proposition of whether or not this part of the affirmative defense that I consider to be, if not a plea in abatement, similar to a plea in abatement, that is, the authority to sue in this court. I understand that you are making an oral motion to be set out and now

[fol. 39; Tr. p. 7]

be heard on that issue.

BY MRS. GOLDMAN:

I objected to the hearing at this time because there has been no proof entitling the complainant to injunctive relief.

BY MR. MAYNARD:

In order to clarify the record, Your Honor, Complainant will now move that the issue of whether or not the complainant has the right to sue under the laws of Mississippi on the alleged ground that it is doing business in Mississippi without having so qualified, be heard preliminary and first, before any of the issues on the merits of the case.

BY THE COURT:

I believe that would dispose of the case, if decided in favor of the defendant. I think it should be heard first. There are several other grounds alleged in the bill of complaint for equitable jurisdiction for immediate relief

other than the one you mentioned in your statement a moment ago.

BY MRS. GOLDMAN:

Your Honor, first of all, I would like to introduce this certified copy of the Articles of Incorporation of Allenberg Cotton Company and I would like for it to be admitted as evidence, since it is a certified copy. It sets out the purposes of Allenberg Cotton Company in incorporating in the State of Tennessee.

BY MR. MAYNARD:

We have no objection.

[fol. 40; Tr. p. 8]

BY THE COURT:

Hand it to the stenographer and let it be marked for identification and admitted as an exhibit.

(SAME IS MARKED AS EXHIBIT 1 FOR THE DEFENDANT, and is attached hereto and made a part of this record as follows, to-wit:)

[fol. 41] STATE OF TENNESSEE
Dept. of State

FILED
MAY 1, 1972
James A. Martin Chan Clk
By J. D.C.

EXHIBIT # 1
By Agreement
For Defendant
11-26-71

I, JOE C. CARR, Secretary of the State of Tennessee, do hereby certify that the annexed is a true and correct copy of the certificate of Incorporation of

ALLENBERG COTTON COMPANY, INC.

which was recorded in this office on March 14, 1946 in Corporation Record Book Misc. A-4, page 68 and the amendments thereto, as follows:
January 4, 1955 P-40, page 65 Increasing the capital stock;
March 27, 1962 P-48, page 2145 Increasing the capital stock.

In Witness Whereof, I have hereto affixed my signature and the Great Seal of the State, at Nashville, this 16th day of November in the year of our Lord nineteen hundred seventy one.

/s/ Joe C. Carr
JOE C. CARR, SECRETARY
OF STATE

SEAL

[fol. 42] STATE OF TENNESSEE
CERTIFICATE OF INCORPORATION

NAME First. The name of this corporation is:
ALLENBERG COTTON COMPANY, INC.

ADDRESS Second. The address of the principal office of this corporation in the State of Tennessee shall be 104 S. Front Street, Memphis, Tennessee, or such other place in Shelby County or any other county in Tennessee as may be from time to time be designated by the Board of Directors

BUSINESS Third. The nature of the Corporation, or subject or purposes proposed to be transacted, promoted or carried on by it are:

Section A: To carry on the business of cotton merchants including the buying and selling of spot cotton, the dealing in cotton futures, the storing, warehousing, insuring, and

hedging of the cotton and cotton sales or purchases; the borrowing or lending of money, unsecured, or secured by cotton warehouse receipts or otherwise, and in general, any other business that may be allied therewith, or ancillary thereto, or useful in the advancement of the general purposes of the business of cotton merchants, and any other business that can be conducted along with said business, or that might advance the purposes, including the right to deal in any commodity by the actual sale or purchase of same by private negotiations or on any organized market, and also including the purchases or sales of future contracts or hedges for any such other commodity.

SECTION B: To manufacture, produce, repair, buy, sell, export, import and generally deal in at retail or wholesale as owners, jobbers, factors or consignees, or in any other capacity, or, all merchandise of every kind and character.

SECTION C: To have and to excercise all the powers now or hereafter conferred by the laws of the State of Tennessee upon corporation organized under the laws under which the Corporation is organized and any and all Acts amendatory thereof and supplemental thereto; but this corporation shall not by any implication or construction be deemed to possess the power to issuing bills, notes, or other evidences of debt for circulation as money, or the power of carrying on the business of receiving deposits of money, or the business of buying gold and silver bullion or foreign coins.

[fol. 43] SECTION D: To conduct business in the State of Tennessee, other states, the District of Columbia, the territories and colonies of the United States and in foreign countries, and to have one or more offices out of the State of Tennessee, as well as within the said State. In any state or country or political division thereof

in which the corporation may have qualified to do business, it shall have all the objects and powers herein set forth, but only to such an extent as may be permitted by the laws of such state or country or political division thereof to any business or commercial corporation.

SECTION E: To do all and everything necessary and proper for the accomplishment of the objects enumerated in this Articles of Incorporation, or any amendment thereof, or necessary or incidental to the protection and benefit of this corporation and in general to carry on any lawful business necessary or incidental to the attainment of the subjects of this corporation whether or not such business is similar in nature to the subject set forth in these Articles of Incorporation or any amendment thereof.

The foregoing clauses shall be construed both as subject and powers; and it is hereby expressly provided that the foregoing enumeration of specific objects or powers shall not be held to limit or restriction in any manner either the objects or powers of the Corporation, and that the Corporation shall possess such incidental powers as are reasonably necessary or convenient for the accomplishment of any of the subjects or powers hereinafter enumerated, either alone or in association with anut [sic] government, state, municipality, corporation, association, partnership, peson [sic] organization or entity whatsoever, at least to the extent and as fully individuals might or could do as principals, agents, contractors or otherwise.

STOCK, WITH CLASSIFICATION AND DISTINGUISHING CHARACTERISTICS IF ANY.

FOURTH The total number of shares of all classes of stock which this corporation shall be authorized to issue is Twenty Thousand (20,000) shares, without nominal,

stated or par value. Each share of said stock shall have one vote.

INITIAL CAPITAL: The amount of capital with which this corporation will begin business shall be One Thousand Dollars ($1,000.00); and when such amount so fixed shall have been subscribed for, all subscriptions of the stock of this corporation shall be enforcible and it may proceed to do business in the same manner and as fully as though the maximum number of as shares authorized under the provisions of the preceding section hereof shall have been subscribed for.

[fol. 44]

DURATION: Sixth The corporation is to have perpetual existence.

SEVENTH: The private property of the stockholders shall not be subject to the payment of corporation debts to any extent whatsoever.

EIGHT: The number of directors of the Corporation shall be fixed by the by-laws and may be increased from time to time in the manner specified therein, provided, however, that the number of directors shall not be less than three. Election of directors need not be by ballot. No director of the Corporation need by a stockholder. Any director may be removed at any time, either for or without cause, so long as the stockholders are entitled to vote in respect to the corporate affairs and management of the corporation, by the affirmative vote of stockholders holding of record a majority of the outstanding shares of the stock of the Corporation which were to vote at the election of such director, given at a special meeting of such stockholders called for that purpose.

NINTH: In furtherance, not in limitation, of the powers conferred upon the Board of Directors by statute, the Board

of Directors is expressly authorized, without any vote or other action by stockholders other than such as at the time shall be expressly required by statute or by provisions of this certificate of Incorporation (and amendments thereof if any) or by the by-laws, to exercise all of the powers, rights and privileges of the Corporation (whether expressed or implied in this Certificate of Incorporation or conferred by Statute) and do all acts and things which may be done by the Corporation including, but without limiting the generally of the foregoing the right:

SECTION A By resolution or resolutions passed by the majority vote of all the members of the Board of Directors as from time to time they constituted to make, adopt, alter, amend and repeal from time to time the by-laws of the Corporation, provided, however, that the holders of the majority of the issued and outstanding stock may alter, amend, or repeal the by-laws made by the Board of Directors and may from time to time limit or define the right of the Board of Directors to alter, amend or repeal any by-law or by-laws made or adopted; and

[fol. 45]

SECTION B By resolution or resolutions passed by the affirmative vote of a majority of the number of Directors as from time to time fixed by the by-laws of the Corporation, to designate one or more committees, each committee to consist of two of the directors of the Corporation, and each such committee to the extent provided in said resolution or resolutions or in the by-laws of the Corporation, shall have and may exercise the powers of the Board of Directors in the management of the business and affairs of the Corporation, such committee or committees to have such name or names as may be stated in the by-laws of the Corporation, or as may be determined from time to time by resolution or resolutions adopted by the Board of Directors; and

SECTION C: By resolution or resolutions by the affirmative vote of a majority of the number of Directors as from time to time fixed by the by-laws of the Corporation, to sell, assign, transfer, convey, or dispose of, or to mortgage or otherwise encumber any real estate or lease of real estate to which or in which the Corporation shall at any time have any right or interest, and, pursuant to such resolution or resolutions, to acquire any right or interest to or in any real estate or lease of real estate; and

SECTION D: By resolution or resolutions, passed by the affirmative vote of a majority of the number of Directors as from time to time fixed by the by-laws of the Corporation, to authorize or approve the purpose by or on behalf of the Corporation of its capital stock, bonds, debentures, warrants, rights, scrip or other obligations of securities of any nature howsoever natured either pro rata from all holders or from time to time in the open market or at private sale, and

SECTION E: By resolution or resolutions passed by the affirmative vote of a majority of the number of Directors as from time to time fixed by the by-laws of the corporation; to sell, lease or exchange any and all of the property and assets of this Corporation, including its good will and its corporation franchises, upon terms and conditions as the Board of Directors may deem expedient and for the best interests of the Corporation when and as authorized by the affirmative vote of the holders of record of at least a majority of the issued and outstanding stock, or when authorized by the written consent of the holders of record of at least a majority of the stock holders issued and outstanding.

[fol. 45a] TENTH: The stockholders and the Board of Directors shall have power, if the by-laws so

provide, to hold their meetings within or without the State of Tennessee, and the books of the Corporation (so far as not prohibited by the laws of said State) may be kept outside of the State of Tennessee at which place or places as from time to time may be designated by the Board of Directors.

ELEVENTH: Subject to the limitations provided for by the General Corporation Law of the State of Tennessee, as from time to time amended, the Corporation reserves the right to amend, alter, change, or repeal any provisions contained in this Certificate or Incorporation, in the manner now or hereafter prescribed by statute, and all rights herein conferred upon stockholders are granted subject to such reservations.

We the undersigned apply to the State of Tennessee, by virtue of the laws of the land, for a Charter of Incorporation for the purposes and with the powers, etc., declared in the foregoing instrument.

Witness our hands this the 13th day of March 1946.

/s/ Eric D. Hirsch
/s/ W. H. Moffatt
/s/ F. O. Oakes

SUBSCRIBING WITNESS:
/s/ Wm. M. Goodman

STATE OF TENNESSEE,
COUNTY OF SHELBY

Personally appeared before me, the undersigned, a Notary Public in and for the State and County, at Memphis, duly commissioned, qualified and acting, the within named incorporators Eric D. Hirsch, Williard H. Moffatt, and

Frank O. Oakes, with whom I am personally acquainted, and who acknowledged that they executed the within application for a Charter of Incorporation for the purposes therein contained and expressed.

Witness my hand and Notarial seal this the 13th day of March, 1946.

/s/ William W. Goodman
Notary Public

S E A L
My commission expires:
April 4, 1948

[fol. 45b] I JOE C. CARR, Secretary of State, do certify that this Charter, with certificate attached, the foregoing of which is a true copy, was this day registered and certified to by me.

This the 14th day of March, 1946.

/s/ JOE C. CARR
Secretary of State

FEE $110.00

[fol. 45c]

STATE OF TENNESSEE
AMENDMENT TO CHARTER OF INCORPORATION

We, Eric D. Hirsch and W. D. Crawford, the President and Secretary, respectively, of Allenberg Cotton Company, Inc., a corporation chartered and organized under the laws of the State of Tennessee, in pursuance to directions from the Directors of the Corporation, hereby certify that at a meeting of the stockholders of said corporation, legally called and held at the offices of said corporation in the City of Memphis, Tennessee, on

December 29, 1954, a resolution in writing was adopted by the stockholders, declaring the desire of the stockholders to amend the charter of their company by eliminating the present paragraph Fourth, and substituting the following therefor:

"Fourth. The total number of shares of all classes of stock which this corporation shall be authorized to issue is as follows:

"A. Twenty Thousand (20,000) shares of common stock, without nominal, stated or par value. Each share of said common stock shall have one vote.

"B. Two Thousand (2,000) shares of $100 par value 5% cumulative preferred stock, preferred on liquidation at par value and accumulated unpaid dividends, without any voting rights at any time, callable in whole or in part by lot or by any other method of selection chosen by this corporation, after thirty (30) days written notice, at par plus accumulated and unpaid dividends, and convertible, in whole or in part, at the option of the respective holders of such stock, at any time on or after January 1, 1957, upon at least sixty (60) days notice to the corporation, into 10 year 5% debentures of the corporation, subordinate to all mortgage, bank and trade creditor indebtedness, such conversion privilege to be at all the call price of par plus accumulated and unpaid dividends on the converted stock."; and that said resolution was duly entered on the minutes of said corporation.

NOW, THEREFORE, we hereby certify to the fact of the adoption of said resolution by the stockholders of the said corporation for the purposes above set out, to the end that this certificate may be duly recorded in the office of the Secretary of State.

[fol. 45d] WITNESS our hand this the 29 day of Dec 1954.

Eric D. Hirsch
Eric D. Hirsch, President

W. D. Crawford
W. D. Crawford, Secretary

STATE OF TENNESSEE,
COUNTY OF SHELBY

Personally appeared before me, a Notary Public of the State and County aforesaid, Eric D. Hirsch, and W. D. Crawford, with whom I am personally acquainted, and who made oath before me in due form of law that Eric D. Hirsch is the President and W. D. Crawford is the Secretary of Allenberg Cotton Company, Inc., and that the statements made in the foregoing certificate are true.

WITNESS my hand and official seal at office in Memphis, Tennessee, this 29 day of Dec 1954.

Nancy Clinton
Notary Public

S E A L

My commission expires:
September 4, 1956

I, G. EDWARD FRIAR, Secretary of State, do hereby certify that this amendment to charter, with certificate attached, the foregoing of which is a true copy, was this day registered and certified to by me. This the 4th day of January 1955.

G. EDWARD FRIAR
SECRETARY OF STATE

FEE: $30.00

[fol. 45e] AMENDMENT TO CERTIFICATE OF INCORPORATION

We, Eric D. Hirsch and W. D. Crawford, the President and Secretary, respectively, of Allenberg Cotton Company, Inc., a corporation chartered and organized under the laws of the State of Tennessee, in pursuance to directions from the Directors of the Corporation, hereby certify that at a meeting of the stockholders of said corporation, regularly called and held at the offices of said corporation in the City of Memphis, on March 30, 1962, a resolution in writing was adopted by an affirmative vote of the stockholders, said affirmative vote representing all of the shares of stock in said corporation, declaring the desire of the stockholders to amend the charter of their said company for the purpose set out below, and that said resolution is as follows:

RESOLVED, that the certificate of incorporation be changed by deleting Article Fourth thereof in its entirety and substitution of the following therefor:

"STOCK, WITH CLASSIFICATIONS AND DISTINGUISHING CHARACTERISTICS, IF ANY. Fourth. The total number of shares of all classes of stock which this corporation shall be authorized to issue is Eighty Thousand (80,000) shares, without nominal, stated or par value. Each share of said stock shall have one vote."

NOW, THEREFORE, we hereby certify to the fact of the adoption of said resolution by the stockholders of said corporation for the purposes above set out, to the end that this certificate may be duly recorded in the office of the Secretary of State.

WITNESS our hands this the 23rd day of March 1962.

/s/ Eric D. Hirsch
President

/s/ W. D. Crawford
Secretary

STATE OF TENNESSEE,
COUNTY OF SHELBY

Personally appeared before me, a Notary Public of the County aforesaid Eric D. Hirsch and W. D. Crawford, with whom I am personally acquainted and who made oath before me in due form of law that Eric D. Hirsch is the President and W. D. Crawford is the Secretary of Allenberg Cotton Company Inc., and that the statements made in the foregoing certificate are true.

[fol. 45f] WITNESS my hand and official seal at office in Memphis, Tennessee, this 23 day of March 1962.

/s/ Nancy Clinton
Notary Public

S E A L

My commission expires: Aug 25, 1964

[fol. 46; Tr. p. 10]

BY MRS. GOLDMAN:

I would now like to request that the certificate of non-certification of Allenberg be entered into evidence.

BY THE COURT:

Describe that a little better, please ma'am.

BY MR. MAYNARD:

We have no objection.

BY MRS. GOLDMAN:

It is a certificate of non-certification of the Allenberg Cotton Company to do business in the State of Mississippi.

BY THE COURT:

By whom?

BY MRS. GOLDMAN:

By the secretary of state of the State of Mississippi. Dated the fourth day of November, 1971.

BY THE COURT:

Let it be received, marked and entered as an exhibit.

(Same is marked as Defendant's Exhibit 2, and is attached hereto and made a part of this record as follows, to-wit:)

[fol. 47] EXHIBIT #2

STATE OF MISSISSIPPI
11-26-71 jml OFFICE OF
SECRETARY OF STATE
JACKSON FILED
May 1, 1972
JAMES A MARTIN, CLERK

CERTIFICATE

I, Heber Ladner, Secretary of State of the State of Mississippi, and as such the legal custodian of the corporate records, required by the laws of Mississippi, to be filed in my office, do hereby certify that I have made diligent search in my office for the record and copy of the charter or articles of incorporation, or certificate of incorporation, of

ALLENBERG COTTON COMPANY

a corporation, and the record of the payment of fees by said corporation, authorized by law, for the filing of such charter of incorporation, or certificate, and there cannot be found therein, or on file in my office, any paper or

record relating to the charter or articles of incorporation, or certificate of incorporation, of

ALLENBERG COTTON COMPANY

a corporation, or any record of any fees paid by said corporation for the filing of said charter or articles of incorporation, or certificate.

I further certify that I have made diligent search in my office for the records and papers relating to the appointment, by the aforementioned corporation, of the Secretary of State, or in lieu thereof an agent upon whom service of process may be had in the event of any suit against said corporation, as authorized by the laws of Mississippi, and there cannot be found therein, or on file in my office, any paper relating to the appointment, by the aforementioned corporation, of the Secretary of State, or in lieu thereof an agent upon whom service of process may be had.

Witness my hand and seal of office, this the 4th day of November 1971.

/s/ Heber Ladner
Secretary of State of the
State of Mississippi

(S E A L)

C-50

[fol. 48; Tr. p. 12]

BY MR. MAYNARD:

For further identification, we will again agree to let it be introduced into the record.

BY MRS. GOLDMAN:

I would now like to call Mr. Covington to the stand.

MR. HAYWARD COVINGTON:

after first being duly sworn, upon oral examination, testified as follows, to-wit:

DIRECT EXAMINATION

BY MRS. GOLDMAN:

Q Would you state your name for the Court please?

A Hayward Covington.

Q What is your occupation?

A I run a cotton business.

Q Where do you pursue this occupation?

A In Marks. There at the compress.

Q In Quitman County, Mississippi?

A Yes.

Q Do you book cotton or solicit contract cotton for the Allenberg Cotton Company in Tennessee?

A I don't know as I solicit it. I contract it.

Q Do you approach farmers about contracting their cotton? With Allenberg?

A Right.

Q How long have you done this?

A I would say two years. Two seasons.

Q You have not solicited any cotton any earlier than 1970?

A Yes, I've solicited cotton earlier—not for them.

[fol. 49; Tr. p. 13]

Q Who approached you about soliciting cotton for Allenberg Cotton Company?

A Mr. Jerry Hill.

Q What other cotton companies do you solicit cotton for at this time?

A Cannon Mills.

Q Contract cotton. You handle Cannon Mills contract—

A Yes.

Q Any other?

A Well, Cook and Company—I would say, not mills, but shippers.

Q Do you handle any other contracts for the purchase of cotton?

A I don't understand what you mean.

Q You said you handled for Cannon Mills, and I didn't understand who else.

A It was for shippers, like Cook and Company—in other words, they wouldn't be a direct mill. I don't think Allenberg is a milling outfit. They are probably shippers, I don't know.

Q Do you approach the farmers?

A That's right.

Q Does Allenberg pay you for this activity?

A I draw a draft on them. I pay the farmer for his cotton, in this connection. It was the same way with Cannon Mills. I pay the farmer and draw a draft on them, plus a commission.

BY THE COURT:

For the information of the Court, I wish you would be more specific. As I understand, Mr. Covington, you are in the business of buying cotton from farmers?

A Right.

[fol. 50; Tr. p. 14]

COURT:

And in the business of soliciting farmers to sell their cotton to or through you?

A Right.

BY THE COURT:

Q Now, for the purposes of this hearing, would you distinguish between ordinary sales of actual cotton and between contracts prior to harvesting time for the sale

by the farmer of all of his crops or a large portion of his crops?

A In buying cotton, you just buy direct from the farmer—

BY THE COURT:

Q Would you distinguish between a contract for future delivery and one for immediate delivery—actual delivery of the cotton at the time the sale was made, or one for future delivery?

A I don't know whether I understand that question or not. Contract cotton is usually contracted before the season ends or before the actual sale begins. The contract is at a stipulated price. They have a time cut off and that's it. Buying cotton, you buy as the season goes along from anybody at any time.

BY THE COURT:

Q If I understand you, you are distinguishing really between sales that are made where the cotton is actually delivered at the time of the purchase and between cotton yet to be produced or in the fields unharvested to be delivered in the future?

A I still don't understand that part of it. Contract cotton, is that what you want me to try to answer?

[fol. 51; Tr. p. 15]

BY THE COURT:

Q What do you call contract cotton?

A It's when two parties have agreed to deliver their cotton at a price, the farmer and whoever he contracts with, at a stipulated price. Then that company or mill designates certain micronaire, certain grades—

BY THE COURT:

Q Never mind the details of the contract. If I understand you, what you're calling a contract is to deliver cotton sometime in the future?

A Right.

BY MRS. GOLDMAN:

Q How many contracts did you have farmers sign for delivery of cotton to Allenberg in 1971?

A I wouldn't be specific about that, but I would say in the neighborhood of 25—about 9,000 acres on different contracts. Probably 20 or 25 contracts.

Q How many contracts did you get signed for future delivery of cotton by farmers to Cannon Mills?

A That was 1967.

Q My question was 1971?

A That's what I answered just then was for 1971 and then you're asking me about Cannon Mills. I did contract cotton in 1967 for Cannon Mills.

Q Did you not contract cotton for Cannon Mills at this time?

A I didn't.

Q For 1971?

A They weren't contracting for 1971.

[fol. 52; Tr. p. 16]

Q Would you name the people other than Allenberg Cotton Company for whom you contracted cotton in 1971?

A None.

Q How long have you operated exclusively with Allenberg Cotton Company on contracting cotton?

BY MR. BRADLEY:

Objection. That's leading, Your Honor.

BY THE COURT:

It is leading. Go ahead.

A Last two years.

Q How much does Allenberg pay you to contract cotton for them?

A I get a commission. So much out of a bale.

Q Is that a set commission?

A Not necessarily. Usually, it's from a dollar to a dollar and a quarter per bale.

Q What causes the variation?

A Well, I don't know—a lot of people handle cotton for a different price. Maybe 50¢ a bale, maybe a dollar—maybe a $1.25.

Q Sometimes they pay you a dollar and sometimes they pay you $1.25?

A No, on this particular contract cotton I made it is stipulated at $1.25 a bale, on the cotton that I'm supposed to handle.

Q Do you have a contract with Allenberg Cotton Company?

A No.

Q Do you keep a record of all the cotton you book for Allenberg Cotton Company?

A Only a sales record.

[fol. 53; Tr. p. 17]

Q You don't keep a record of whether the farmers delivered to you or not?

A I've got a record. I know what they're delivering—when they bring cotton in—I've got his name. I've got his contract. I pay him for this cotton and then I immediately in turn draw on Allenberg, plus a commission. Sometimes I charge it to the farmer, however that the contract reads. In some instances the farmer pays my commission. Other instances, Allenberg pays me.

Q You say you draw a draft on Allenberg—

A Yes.

Q You do that in your office?

A Right.

Q On what bank?

A Union Planters National. I wouldn't be positive. I've got a secretary that handles all that. But I think that's

who it is.

Q Do you keep Allenberg Cotton Company contract forms in your office?

A I do.

Q For how long have you been keeping these contract forms in your office?

A Well, I've only been in business with them in this way during the last few years. Last year and this year —'70 and '71.

Q Had you or had your secretary typed individual information about a farmer on these forms?

A Not that I know of, no.

Q What is your procedure for getting the information on these farmers that's necessary for these contracts?

[fol. 54; Tr. p. 18]

A I give them the information—the farmer's name, who's interested in a contract—

Q How do you know that they're interested?

A I talk to the farmers.

Q You approach the farmers?

A I could do it. He would probably approach me to see what I could offer.

Q But on most of your contracts did you approach the farmer or did he approach you?

A That's the usual—

Q You approach the farmer?

A That's right.

Q Do you get information from the farmer about his acreage?

A I do.

Q What do you do with that information?

A I give it to Allenberg.

Q Do you give it to them each time you approach a farmer, or do you send in reports to them?

A No, when they make out a contract they've got the information of how many acres, the kind of seed that he plants, what gin he will probably use. That's usually the three things that they're interested in.

Q Do you send this information in to them on each farmer separately or do you send in a report to them?

A I don't send in anything.

Q How do they get this information from you?

A Over the telephone.

Q When you call them do you tell them an individual farmer's acreage or do you tell them of a group of farmers?

[fol. 55; Tr. p. 19]

A No, I give them individual farmers.

Q Each time you approach a farmer you call Allengerg?

A Right.

Q And you give them the information about the farmer that goes into a contract?

A Right.

Q At this time do you know whether the farmer is going to sign the contract or not?

A No. We had some occasions where they didn't or wouldn't. I don't know which, after the contracts were drawn up.

Q Why do you keep the contract forms in your office?

A Well, the usual thing—there's three. When they send them in there's 3 copies. The farmer keeps one, I keep one and one is mailed back to Allenberg.

Q But the empty forms—do you ever keep the empty contract forms before the information is put on it?

A No.

Q You have none of those forms in your office?

A No, I don't fill those out.

Q Have you ever adjusted a form or made a change

on it after it was sent to you from Allenberg?

A No, I don't make any changes at all.

Q No information has ever been added to a contract in your office?

A No.

Q You state that after the farmer signs the contract, you keep one of them?

A Right.

Q Do the farmers on contracts which stipulate delivery to Allenberg in Memphis, of the receipts and class cards, ever bring their receipts and class cards to you?

[fol. 56; Tr. p. 20]

A How's that?

Q Do you ever receive warehouse receipts and class cards on contracted cotton for Allenberg at your office?

A Yes.

Q And issue payments?

A Right.

Q Although the contract reads that it should be sent to Memphis?

A I don't know as the contract reads it has to be sent to Memphis.

Q If a contract read that would you still receive—

A I think I would. However, let me tell you this. I have sent receipts and class cards direct to them. Cotton that they didn't want payment probably until the first of the year. That cotton would be handled up there.

Q Do you make a contact with the representative from Allenberg and set a time for him to come down to your office to sign up these contracts?

A No, I don't set up any time. He's been there on maybe two or three occasions.

BY THE COURT:

Who is "he"?

A Jerry Hill. He brought Mr. Pittman's and Ben E. Pittman's contract down. As well as I remember he brought J. G. Harris' contract and B. B. Pennington's and Harold McChresten's contract down from Memphis. I think that was all he brought down. He might have brought some colored people's contracts up around Sledge, but they didn't sign the contracts and they just cancelled. Jerry Bland, six or seven of them.

[fol. 57; Tr. p. 21]

Q Did he bring any other contracts down?

A Not that I know of. They would be mailed to me. I in return would call the farmer and tell him that I had his contract. He would come in and sign three. He got one, I got one and I mailed one to Allenberg.

BY THE COURT:

You mean signed three copies of the contract? You don't mean three contracts, you mean three copies at one time?

A Yes, sir, two copies of one contract.

Q So on the contract which Jerry Hill does not sign, you have the farmer come directly to your office and you approve the contract?

A Jerry Hill's name appears on these contracts. He had signed these contracts.

Q Prior to the mailing of these contracts?

A Evidently, yes. His name would be on them, so when the farmer signed it everything was in order.

Q Did—when Jerry Hill came to your office to sign a contract, did you notify the farmers that he was going to be there?

A Yes m'am, I think I did. I notified them either before or right at the time he was there. In other words, the usual thing, I would probably know whether he was coming down or not and I would notify the farmers that he

was coming.

Q Why do you use a different procedure on some of your contracts? Some are signed with Mr. Jerry Hill there and some signed in Memphis before they are mailed out?

[fol. 58; Tr. p. 22]

BY MR. BRADLEY:

Objection. That's an improper question.

BY THE COURT:

Sustain the objection.

Q So you would say you use a different procedure for signing—

BY MR. BRADLEY:

Objection.

Q Do you use a different procedure for signing contracts with Allenberg?

A No.

Q With regard to the representative from Allenberg?

A No.

Q You use the same procedure for all contracts?

A It just so happened that Mr. Hill was down here, as I told you about, and the other times he just mailed them. I don't think it was necessary for him to make a trip down here for it. I could tend to it. I reckon I was supposed to do something.

Q Has Allenberg ever rejected any of your contracts?

A No M'am.

Q Have you ever attended any functions of the Allenberg Cotton Company?

A No M'am. I've never been in the office.

Q Have you ever had any contact with any other member of the Allenberg Cotton Company besides Mr. Jerry Hill?

A No, I haven't.

Q Do you always talk to Mr. Jerry Hill when you call the Allenberg Cotton Company?

A Yes.

Q You talk directly to his office?

[fol. 59; Tr. p. 23]

A He does all the cotton buying for Allenberg, but he's got charge of the buying in this territory.

Q And you have never dealt with anyone else within the company except Mr. Hill?

A That's right. There was one time that I did deal with Mr. Bayer on a contract with Joe Benson. Jerry was in Texas and there was a contract mailed to Joe Benson. I only talked to Mr. Bayer and I understand he's the president.

Q Is the cotton that is contracted for Allenberg stored in the federal compress in Marks, Mississippi?

A Not all of it. Some's in the North Delta. Most of it's in the Marks Compress.

Q All of it is stored in Mississippi, to your knowledge?

A Yes. I don't know of anything out of the State.

Q When do you turn the receipts you receive from farmers over to Allenberg Cotton Company?

A As soon as I can bill it out. Draw a draft for it.

Q No further questions.

CROSS EXAMINATION

BY MR. BRADLEY:

Q The cotton which you purchase is purchased for the purpose of shipping in interstate commerce is it not?

A I don't know what you mean.

Q Is it bought by Allenberg for shipment to mills in foreign states? That's my point.

BY MRS. GOLDMAN:

I object.

A Well, I don't know that.

[fol. 60; Tr. p. 24]

Q You buy cotton for Allenberg, but you also buy cotton for yourself, do you not?

A Right.

Q How long have you been so engaged in buying cotton for yourself?

A 30 years or longer.

Q Now, with reference to the cotton you say is stored in North Delta, it is stored there until it is shipped?

A Right.

Q And where is it shipped?

BY MRS. GOLDMAN:

I object to that, Your Honor.

BY THE COURT:

Overruled. Answer the question, if you know.

A Well, it's shipped to foreign countries, different mills. Wherever they want to sell it. Lot of it in Marks went to Japan.

Q With reference to the warehouse receipts — you send those to Union Planters Bank in Memphis, Tenn. do you not?

A In a draft, yes, sir.

Q And also you send the class cards and other pertinent information along with that?

A Right.

Q The warehouse receipts are a part of that package you send to them along with your draft. That right?

A Yes, sir. Receipts and class cards and the billing.

Q Do the contracts that you submit to Allenberg have to be approved in Memphis?

[fol. 61; Tr. p. 25]

A Yeah, they have to be approved. I don't approve anything. I have no authority whatsoever.

Q Is that correct, that they are approved in Memphis?

A Yes, I'm sure it is.

Q That's all we have, Your Honor.

RE-DIRECT EXAMINATION

BY MRS. GOLDMAN:

Q You mentioned that you buy cotton for yourself. Do you ever contract cotton?

A Not for myself, no.

Q Do you contract cotton for future delivery from a farmer with anyone but Allenberg Cotton Company?

A I did for Cannon Mills in '67, but they haven't contracted cotton for the last two years.

Q Do you ever report farmers for non delivery of cotton under a contract?

A No, not necessarily. Unless I know that this farmer is going to deliver or is not going to deliver or if he's late about delivering cotton. I know if he's got cotton to deliver and hasn't delivered it. Then I might notify them.

Q Would you say you police the contracts for Allenberg Cotton Company?

BY MR. MAYNARD:

We object to that, Your Honor. That's a non-descript word.

BY THE COURT:

I think that is pretty strong language.

A No, I don't police them.

Q Do you contact the farmer if he does not deliver cotton under a contract?

[fol. 62; Tr. p. 26]

A I haven't been accustomed to doing that.

Q You do not contact the farmer?

A No, I haven't.

Q But I believe you said you contacted Allenberg or notified them?

A Well, now there's some colored people over at Swan Lake that's got a contract with Allenberg and I know that they've got cotton out and I notified Allenberg, but I suggested that they call them. I believe Mr. Hill did call.... I do if I know they're way off.

Q Do you contract cotton for Allenberg in any other place except Marks, Mississippi?

A No, I haven't tried to contract any except in Quitman County.

Q You say that—did I understand you to say that Allenberg approves the contracts?

A Yes, they make the contracts out. I have nothing to do with it.

Q When you get a contract into your office, three copies of it, and the farmer comes in and signs it and the representative from Allenberg Cotton Company has already signed, Mr. Jerry Hill—

A Yes.

Q And do you consider this contract—

BY MR. BRADLEY:

Objection.

Q Does this contract take effect—

BY MR. BRADLEY:

Objection.

BY THE COURT:

Let the contract speak for itself if the contract's involved.

[fol. 63; Tr. p. 27]

Q Has Allenberg ever been notified by you that contracts were being signed in your office at a specific time?

A No, that's not necessary.

Q Has any contract signed in your office ever been rejected by Allenberg?

A No'm.

Q Have you ever called Allenberg Cotton Company while the farmer was present in your office and asked them to approve a contract?

A No'm.

Q What do you define as approval?

BY MR. BRADLEY:

Objection.

BY THE COURT:

Overruled.

A When Jerry Hill has signed one for Allenberg that half of it is already complete and then when the farmer signs it, it is a complete contract. Both of them. Jerry Hill won't be present but his name will be on it. Allenberg contracts their part of it and when the farmer signs it, it's a closed deal. Contract's a contract.

Q There's no question then, about the contract?

A That's my idea.

Q Whether Jerry Hill is present in your office or mails the contract to you?

A His name's on it, yes m'am and I know his signature.

Q Has any farmer ever re-negotiated a contract with you?

A I don't know what you're talking about there.

[fol. 64; Tr. p. 28]

Q Have you ever changed the terms or price or the terms in any way?

A No.

Q You've never bargained with a farmer to put more cotton under contract and to raise the price?

A No. They have adjusted some contracts.

Q Who has?

A Allenberg. With the people who had more acreage —planted more acreage after the contract was signed and they have made adjustments.

Q Did they come down into Mississippi and make these adjustments?

A Yes.

Q Who comes?

A Mr. Hill. I have had some adjustments and he has made some adjustments in Memphis on some contracts.

Q At your suggestion?

A Yes, but he would be the one who did it.

Q But the farmer would come into your office and talk to you?

A He would pray for an adjustment.

Q Would you tell him that you would have to contact Allenberg or not?

A I would.

Q Does Allenberg accept your recommendations with regard to adjustments?

A Well, they've been mighty fair people. I'll put it that way. They'll go along as long as they can.

Q What procedure is used for adjustments as far as you're concerned?

A None.

Q You simply call Allenberg?

[fol. 65; Tr. p. 29]

A Tell him this farmer has got more acreage and he would like to get an adjustment some kind of way. They usually will do that.

Q Does anyone come to your office to do that?

A Mr. Hill came down there on one or two occasions to try to do that.

Q He comes down from Memphis and gets the farmers in your office?

A Yes.

Q Has ever an adjustment been made without Mr. Hill's coming down?

A No'm. They write up the contract.

Q Mr. Hill brings the contract with him?

A Yes'm. A new contract is made when they make an adjustment.

Q Are you given a copy of this contract?

A Yes'm.

Q You keep it in your office?

A Yes'm.

Q No further questions.

RE-CROSS EXAMINATION

BY MR. BRADLEY:

Q This new contract is made in Memphis, is it not?

A Yes.

Q That's all we have.

EXAMINATION BY THE COURT:

Q I don't quite understand—what authority do you have from Allenberg Cotton Company?

A I don't know as I have any authority.

Q Have you ever yourself made a contract for and in the name of Allenberg?

A I have not.

[fol. 66; Tr. p. 30]

Q Do you have any authority to make a contract for

them?

A I do not.

Q What is your relationship with Allenberg Cotton Company? What are you instructed by them to do?

A Just to—well, I don't know what you'd call it. I'm not an agent. I just carry—

Q Don't define it, just tell me what you're instructed to do.

A Well, you mean on the contract cotton—

Q Yes, with regard to negotiating, arranging or bringing about a contract to sell cotton—

A The usual procedure is the farmer is contacted—

Q Now, what did Allenberg tell you to do about it?

A Well, they asked me if I can sell some contract cotton. How many acres can I buy at a stipulated price.

Q You solicit business for them? Is that it?

A That's right.

Q After soliciting business for them, how is that business brought fruition? How is it brought to a contract?

A They make the contract. I quote them that so and so will sell so many acres. I'll use Mr. Benson, say 800 acres of cotton. They use acres and not bales at a stipulated price.

Q You have discussed the matter with Mr. Benson and he's indicated the willingness to sell his cotton?

A Right.

Q To sell his cotton at a certain price?

A That's right.

[fol. 67; Tr. p. 31]

Q Then what do you do with that situation with Mr. Benson?

A I call Allenberg and tell them that Mr. Benson will put up 800 acres of cotton at a stipulated price. Then a contract—three—is mailed to me, with Mr. Benson's

name on it, his address and all the stipulations—micronaire and grade, staple—

Q Is this a complete offer and contract on the part of Allenberg?

A It is.

Q Before it reaches you?

A It is.

Q Then what do you do?

A I call the farmer and make contact with him in some way and he comes into my office and signs it. Signs all three copies.

Q He then signs the contract, if it's agreeable to him?

A That's right.

Q Previously Allenberg has signed the contract and sent it to you for consummation?

A Right.

Q That is by submitting it to the farmer for his approval and signature?

A Right.

Q After that what happens?

A I mail it back. I file one, mail Allenberg a copy and the farmer keeps one.

Q Then what happens?

A That's it as far as I'm concerned.

Q That's the contract?

A Right.

Q Do you do anything about the contract at any future date?

[fol. 68; Tr. p. 32]

A Not necessarily. As I said, if some of them are behind—

Q Would you state what instructions, if any, you've had from Allenberg about keeping up these contracts or notifying or giving them information about them?

A They insist that some of them are not delivering the cotton and want to know what's the matter with so and so—

Q Do you know what general procedure or how they get that information?

A They're not sending the cotton. They know which contract is being filled by drafts that I draw on them.

Q Has Allenberg instructed you to receive the cotton for them?

A That's the only way they can get it.

Q Then when the farmer has harvested his crop, the farmer is then told to deliver the class card and the receipts to you?

A Right.

Q For payment?

A Right.

Q Then you, through your office, the actual compress and warehouse receipts and negotiable warehouse receipts are delivered to you and you give the farmer a draft on a Memphis Bank in payment—

A I give him my check. My personal check. That is Covington Cotton Company check. I pay him. Then I draw a draft on Allenberg for this amount—the amount of the cotton plus $1.25 commission. Sometimes they pay it. Sometimes it's charged to the farmer.

[fol. 69; Tr. p. 33]

Just whichever way the contract reads.

Q Through that draft, drawn on a bank in Memphis, you attach the negotiable cotton warehouse receipts and the class cards?

A Right.

Q And that's the way you receive your compensation for what you have paid the farmer for them, plus your commission?

A Right.

Q I believe that's all.

BY MRS. GOLDMAN:

May I ask a few more questions, Your Honor?

BY THE COURT:

I hope they will clarify the situation.

FURTHER DIRECT EXAMINATION

BY MRS. GOLDMAN:

Q Do you buy cotton for Allenberg other than contract cotton?

A Yes. I don't necessarily buy for them. I sell to them or for them. I sell for other people. I don't just confine—I'm not restricted just to buy cotton for them.

Q Approximately how much cotton did you buy for Allenberg in 1970, which was not under contract?

A Between 6,000 and 7,000 bales of cotton. Maybe not that many to them, but the bulk of it went to them. They had a good price on low grade cotton. I bought, practically, most of it for them.

Q Do all farmers who want adjustments on their contracts contact you?

[fol. 70; Tr. p. 34]

A Yes'm. I don't know of any of them ever calling Allenberg directly. I have no knowledge of that.

Q No further questions.

(Witness excused.)

MR. JERRY HILL:

after first being duly sworn, upon oral examination, testified as follows, to-wit:

DIRECT EXAMINATION

BY MRS. GOLDMAN:

Q Mr. Hill, would you state your name to the Court please?

A Jerry L. Hill.

Q Where do you live?

A 1276 Pidgeon Perch. Memphis, Tennessee.

Q What is your occupation?

A Cotton buyer for Allenberg Cotton Company. Exclusively in charge of Memphis territory cotton.

Q You don't have any Mississippi cotton under your management?

A Mississippi cotton is considered Memphis territory cotton.

Q Where is your office?

A 104 South Front Street, Memphis, Tennessee.

Q That is the offices of Allenberg Cotton Company?

A Right.

Q What is your title?

A Cotton buyer.

Q Are you one of a number of cotton buyers?

A As I stated before I'm in charge of the Memphis territory cotton ... Buying. We also have a man in charge

[fol. 71; Tr. p. 35]

of buying cotton in Texas. We have one in charge of buying cotton in California — Arizona.

Q Have you ever worked in any other territory except the one in which you're working now?

A Not on the terms as you would say working. I have gone to South Texas before and worked down there during the summer when the crop starts down there. It usually starts about the middle of July. We're not real busy in the office in Memphis and we'll go down and help out down

there.

Q What do you do in South Texas when you go down there?

BY THE COURT:

Is that relevant as to whether they're doing business in Mississippi?

BY MR. MAYNARD:

We object, Your Honor.

BY THE COURT:

Mrs. Goldman, if it does I want to hear from you, but I don't see where buying cotton off from somewhere has anything to do with here.

Q Is your procedure in South Texas in dealing with farmers any different than your procedure in Mississippi?

BY MR. MAYNARD:

We object to that.

BY THE COURT:

Sustained.

Q How much Mississippi cotton did you approve —

BY MR. BRADLEY:

Objection.

BY THE COURT:

Why is it relevant?

[fol. 72; Tr. p. 36]

BY MRS. GOLDMAN:

I want to see how much business Mr. Hill is doing in the State of Mississippi.

BY THE COURT:

Q Do you know how much cotton Allenberg bought from Mississippi during the 1970 harvest, approximately?

A It would be hard to say. I would say probably 25,000 bales, something like that.

BY THE COURT:

Q Do you know how much has been bought to date

from the 1971 harvest?

A I would say approximately 25,000 bales.

BY THE COURT:

Does that answer your question, Mrs. Goldman?

BY MRS. GOLDMAN:

Yes.

EXAMINATION CONTINUED BY MRS. GOLDMAN:

Q Do you come down into Mississippi and buy cotton which is not contract cotton?

A We have what you call these local, like Mr. Covington, a local cotton broker, and everything is handled through him. I don't come down and just solicit business. Everything is done and approved in Memphis before anything is done.

Q Then you never make any trips into Mississippi?

A I make trips, yes m'am. I do make trips. More or less social visits, social calls. People that you have done business with previously. I'll stop by, like Mr. Covington, I'll stop by and say hello to him.

[fol. 73; Tr. p. 37]

Q You say if you're down in this area, what do you do in this area for Allenberg Cotton Company?

A Like I say, it is more or less a social, not a social, but just a courtesy call or something like that. Most of my time is spent in the office in Memphis, Tennessee.

Q Have you ever contacted a farmer in Mississippi about the cotton?

A Not to my knowledge, no.

Q Who sets up your contacts with the farmers?

A I don't set any contracts with the farmer directly. Any contracting that is done is done through Mr. Covington or whoever's down here, but I don't come down and just deal directly with the farmers.

Q In 1971 did you come down with the contracts from Memphis to Mr. Covington's office?

A I did.

Q And have the farmers sign them?

A I did.

Q Were these contracts signed by you—endorsed, approved and signed by Jerry Hill?

BY MR. BRADLEY:

Objection. Leading.

BY THE COURT:

Yes, it's leading, but go ahead. We want to get through.

BY MR. BRADLEY:

But the terminology is very important on this—the way it's being asked.

[fol. 74; Tr. p. 38]

BY THE COURT:

I agree with you. Rephrase the question.

Q Did you approve and sign the contract before you left Memphis?

A Yes. The contracts were approved and accepted before I left Memphis. If they had not I would have not brought the contracts down.

Q Were they approved and accepted by you?

A The contracts were approved and accepted in the Memphis office by Mr. Ben Bayer, who is president of the company and myself. Everything that is done is discussed between Mr. Bayer and myself. He is president of the company. I am in charge of buying the Memphis territory cotton. So therefore, before any contract was drawn up, we both agree upon a price and if we think it's a good deal we'll draw a contract up. Nothing is approved or accepted other than in the Memphis office.

Q Is Mr. Bayer the—does Mr. Bayer ever sign one

of these contracts?

A Yes he does.

Q I notice on the contract that you brought to Mississippi, Mr. Bayer's signature was not there—

A That's true. He does not sign them all. Neither did I sign them all, but on the biggest part of the cases I have signed them and I have approved them.

Q Your Honor, may I ask him if he signed this contract and approved it?

[fol. 75; Tr. p. 39]

BY THE COURT:

Ask him and find out.

Q Did you sign that contract?

A Yes.

Q Did you sign it before you left Memphis?

A These are the two contracts that we're discussing now. Those two contracts were signed down here. But they were approved and accepted before they left Memphis, Tennessee. If they hadn't been accepted we would not have drawn the contracts up to begin with and I would have not been down here to begin with. The normal procedure is, to have the contract drawn up in Memphis, signed and approved in Memphis and sent to Mr. Covington or whoever we're doing business with—sent to them and it is signed by the farmer—three copies—one to the farmer, one to Mr. Covington and one to us in Memphis. That is the normal procedure. I was coming down this way—in this particular case here.

Q Why did you come?

A It wasn't specifically for that. I may have been going to Greenwood or to Greenville, Mississippi or someplace and I brought the contracts down with me.

Q This is marked approved and accepted by you on

this date—

A Right.

Q Did you report to your office on January 28, 1971?

A No. It was already approved and accepted before I came down here. Although I put my signature on it down here. It was accepted in the office in Memphis,

[fol. 76; Tr. p. 40]

Tennessee. Like I have said twice before, I would never have drawn contracts up if they hadn't been accepted....

BY THE COURT:

Excuse me. You're talking about a contract and I believe you've simply asked the witness about a contract. For the record, would you identify the contract that you're talking about and for my help.

BY MRS. GOLDMAN:

This particular contract with H. T. Pittman was marked—it's a contract with H. T. Pittman of Marks, Mississippi—

BY THE COURT:

Is this the original of the contract which is an exhibit to the Bill of Complaint pending before the Court?

BY MR. HILL: (witness)

Your Honor, this is a copy of the original.

BY THE COURT:

That's one of the original copies.

BY MR. MAYNARD:

Yes, sir.

CONTINUED EXAMINATION BY MRS. GOLDMAN:

Q Did you bring other contracts to Mississippi at the same time that you brought this contract down on January 28, 1971?

A Mr. Ben E. Pittman.

Q No other contracts that you brought to Mississippi and signed in the presence of farmers?

A I think Mr. Covington named three other people and I believe that's all to my knowledge. Mr. James Harris,

[fol. 77; Tr. p. 41]

Mr. B. B. Pennington, and Harold Max Chrestman.

Q Did you bring those the same day?

A I don't remember the day.

Q How much of your time do you spend in Mississippi?

A Very little. I couldn't tell you the days or hours. Very little time do I spend in the State of Mississippi. Most of my time is spent in the office in Memphis.

Q Do you buy cotton on the telephone?

A Right.

Q When you buy Mississippi cotton on the telephone, how is the delivery on that cotton made?

BY MR. MAYNARD:

Objection, Your Honor, that's not the case here.

BY THE COURT:

Overruled.

A If I'm dealing with Mr. Covington or anyone, they'll call up and say — "Jerry, I've got 100 bales on hand" and want to know what kind of price or he'll tell me what kind of price he'll have to have for the cotton, and I'll say, "Well, what kind of cotton is it" and he'll give me a recap of the green card class and if I think it's high I'll say, "No, I'm not interested". If I think the cotton is in line with what we're paying for other cotton in other area I'll say, "Okay" and he'll draw a draft. He puts his receipts and the green cards in a draft and draws them on Allenberg.

BY THE COURT:

Q What do you mean green cards?

A Class cards.

[fol. 78; Tr. p. 42]

Q Do you contact farmers on the telephone or ever talk directly to farmers. Do you only talk to buyers?

A Buyers.

Q You've never bought cotton from farmers over the telephone?

A In some instances I may have. I don't really recall right off hand.

Q Do you approve contract cotton in other states other than Mississippi.

A I say, Memphis Territory. Memphis territory consists of other states other than Mississippi.

Q Do you yourself approve cotton from other states other than Mississippi?

A Right.

Q In what other states?

A Missouri, Arkansas, Tennessee and Louisiana.

Q Do you go into the other states?

A I make visits like I do here.

Q Do you ever call Mr. Covington and tell him you need a certain amount of cotton and ask him to buy it for you?

A If I'm in the market for buying cotton I'll call Mr. Covington and say I would like to buy some cotton and he'll say either, well I can either buy some or I can't. Usually when a cotton firm is in the market, they'll call people that they usually do business with and tell them they're in the market. You're in the market and you're out of the market. It's a day to day thing. It fluctuates just like the prices do. I wouldn't call him and say I want to buy a 100 bales. I'd just call him and say I want

[fol. 78; Tr. p. 43]

to buy some cotton. It may be a 100 bales, it may be 200, I don't know.

Q And that cotton is delivered to his office?
A Right.
Q And he pays the farmer for that cotton?
A Absolutely.
Q And then draws a draft on Allenberg Cotton Company?
A Right.
Q No further questions.

CROSS EXAMINATION

BY MR. BRADLEY:

Q You mentioned that you approved and you buy—do you make decisions on when and how to buy cotton yourself?

A Well, like I said, Mr. Bayer is president and he more or less says—before he became president he was in charge of the selling and buying of Memphis territory cotton, so anything is done now, we discuss with each other. We kind of set the price. We usually know what the price is. He'll ask me what I want to do and in turn I'll ask what he wants to do and then we'll agree upon a price or what we want to do, what position we want to take.

Q Do you take positions individually with reference to the price and approval of contracts on your own initiative without the advice and consent of other officials of the company?

A No, sir. He always has to put his approval on them.

Q Is the cotton which you purchase for Allenberg, with the advice and consent of the officials of the company, purchased for interstate shipment—those contracts

[fol. 80; Tr. p. 44]

which are purchased in Mississippi, are they purchased for interstate shipment of the cotton to other foreign states

and countries?

BY MRS. GOLDMAN:

I object to that.

BY THE COURT:

Overruled.

A Right.

Q Is the cotton which you have purchased in Quitman County, cotton already sold by Allenberg before it is ever purchased by your firm?

A Right. In most cases, yes, it is. Either sold to a mill or—

Q Well, with reference to both Pittman cases, senior and junior, was the cotton acreage already sold to mills for interstate shipment before you made these contracts?

BY MRS. GOLDMAN:

I object, Your Honor, on the grounds that the Ben E. Pittman case is not being heard at this time.

Q Well, is it correct with reference to H. T. Pittman?

A Yes, sir.

Q You mentioned the storage of 25,000 bales of cotton in this State last year—is this cotton stored temporarily until it can be shipped in interstate commerce?

A Yes, sir.

Q Does your firm ever reject contracts which are submitted by Mr. Covington—proposals which are submitted by Mr. Covington?

A Right.

[fol. 81; Tr. p. 45]

Q Does Mr. Covington have any authority on his own, under any circumstances to approve proposals or contracts sent to your office?

A No, sir.

Q Can he alter the terms of contracts submitted by your firm?

A No, sir.

Q Can he execute a contract for and on your behalf?

A No, sir.

Q Do you have or does the firm have any offices in the State of Mississippi?

A No, sir.

Q Does it have any employees in the State of Mississippi?

A No, sir.

Q Does it have any agents in the State of Mississippi?

A No, sir.

Q I believe that's all.

RE-DIRECT EXAMINATION

BY MRS. GOLDMAN:

Q Do you work in the shipping department of Allenberg Cotton Company?

A When I am in the office in Memphis and when I'm not on the phone buying cotton, I'm in the cotton room, classing or shipping cotton, yes.

Q So you are not a cotton buyer?

A Cotton buyer—that is my official title. In these terms, in the days of your high cost and everything, a person who has any knowledge of cotton at all, he does other things other than buy. He also chips in and helps ship cotton too.

[fol. 82; Tr. p. 46]

Q Of your own personal knowledge, has Allenberg ever rejected a contract that was signed in the office of Mr. Covington in Marks, Mississippi?

A No—that was previously signed by Allenberg—

Q Yes.

A No.

Q Does Mr. Covington deal with you when he contacts Allenberg?

A On most occasions he does. Like he stated, when I was in Texas, Mr. Bayer bought, my recollection was about three different crops. Mr. Bayer approved and accepted as president of the company. He also deals with Mr. John Howard in our office when I'm not present.

Q If a Mississippi farmer wants to make an adjustment on his contract, does a cotton buyer contact you about any adjustments?

A He will come to Mr. Covington and express his grievances, whatever they may be, Mr. Covington in turn will call me and say well this John Jones has 50 extra acres, is there any way we can make any adjustments on it. I will then talk to Mr. Bayer about it and if we agree upon it, a new contract is made, approved and accepted in Memphis and sent to Mr. Covington.

Q Do you have an office at Allenberg Cotton Company?

A Yes.

Q Does a secretary type the information on a contract on the contracts that Mr. Covington solicits for you?

A Yes.

Q Do all calls with reference to these contracts come into your office?

A The information from Mr. Covington comes into my office, yes.

[fol. 83; Tr. p. 47]

Q To your personal knowledge, is there any arrangement with the switchboard of the Allenberg Cotton Company to channel discussions of Mississippi cotton to your office?

A Well, when Mr. Covington calls in, he just doesn't call in and say this is Mr. Covington. He says I want to speak to Jerry Hill. It's channeled that way.

Q When I called Allenberg, I was told, just a moment I'll refer you to the Mississippi Division—are you familiar with this procedure?

BY MR. MAYNARD:

We object. We think it's irrelevant and we object on that ground.

BY THE COURT:

Sustained. I don't think it's important how they might route calls from unknown persons.

Q That's all.

RE-CROSS EXAMINATION

BY MR. BRADLEY:

Q When you say your office, you mean the office of the firm?

A Well, I have an individual office in Allenberg Cotton Company, as other people do. You have to have some place to have a desk . . . telephone.

Q I believe that's all.

(Witness excused.)

[fol. 84; Tr. p. 48]

MR. BEN E. PITTMAN:

Defendant, after first being duly sworn, upon oral examination, testified as follows, to-wit:

DIRECT EXAMINATION

BY MRS. GOLDMAN:

Q Mr. Pittman, have you ever been solicited by the Allenberg Cotton Company to contract your cotton?

A I'd been notified by Mr. Covington that they wanted my cotton.

Q What procedures did they use to get this information about your crop from you?

A I don't know how they got it all. Mr. Covington, I'd see him once or twice a week and he has asked me in the past how many acres of cotton and I told him in general about how many acres of cotton I thought I'd have.

Q Nobody else from Allenberg secured that information from you?

A No.

Q Were you contacted by Mr. Covington in January of 1971 to come to his office?

A I was.

Q What did he say in that conversation?

BY MR. MAYNARD:

We object to that. Mr. Covington is not part of this suit. That's hearsay.

BY THE COURT:

This transaction was negotiated through Mr. Covington and one of the issues may be his status in it. So you may answer the question.

[fol. 85; Tr. p. 49]

A Mr. Covington called and said Mr. Hill was at his office and had a contract and wanted me to come down and talk to him and see about signing it.

Q Was any discussion between you and Mr. Hill after you arrived at Mr. Covington's office about the contract?

A We just talked in general there. I don't know exactly what it was about. But we signed the contract there.

Q Did you discuss the terms of the contract with Mr. Hill?

A Yes, I did.

Q Did Mr. Hill at any time say the contract had to be approved in Memphis?

A No.

Q Did he at any time say the contract had already been approved?

A No, he didn't.

Q Was there anything to indicate to you that this contract might be rejected by Allenberg?

A No.

Q Were there any other farmers in Mr. Covington's office when you were there?

A Just me.

Q No further questions.

CROSS EXAMINATION

BY MR. BRADLEY:

Q What time did you arrive at the office, if you can recall?

A I can't recall.

Q Do you remember what day it was?

[fol. 86; Tr. p. 50]

A No.

Q Did you go to the office more than one day to discuss this—

A No, I didn't.

Q That's all.

(Witness excused.)

BY MR. MAYNARD:

Your Honor, we would make a motion to strike his testimony because it's in reference to Mr. Ben Pittman's contract, not Mr. H. T. Pittman's contract.

BY MRS. GOLDMAN:

Your Honor, this testimony is put on by a farmer about the activities of Jerry Hill.

BY THE COURT:

I don't believe you identified what contract was signed.

If you want to recall the witness to identify what contract was signed, you may do so.

(Mr. Pittman is recalled to the stand by the Court)

BY THE COURT:

Q Mr. Pittman, you've testified about an occasion when you met Mr. Hill in Mr. Covington's office in Marks, and mentioned the signing of a contract or contracts, by you and Mr. Hill. What contracts were these?

A Contracts of Ben E. Pittman and H. T. Pittman.

Q Was the contract the one of H. T. Pittman now pending before the Court?

A Yes, sir.

Q Also one in a similar suit pending against you, by Allenberg Cotton Company?

[fol. 87; Tr. p. 51]

A Yes, sir.

Q Stand aside.

BY MR. MAYNARD:

Your Honor, I would like to ask a question.

FURTHER CROSS EXAMINATION

BY MR. MAYNARD:

Q I presume you have the right to sign for your father?

A No, sir, I found out that I didn't.

Q Why did you sign?

A I was under the understanding that Mr. Hill and them had talked to daddy and the way it was presented to me, I thought it was all right with him.

Q When did you advise him you'd signed?

A The next time I saw him which was the next morning.

Q After you advised him, do you know whether or not

he disaffirmed the contract?

A I know the next time he saw Mr. Covington, he told him that I didn't have the right to sign for him and he wasn't going to deliver.

Q Wasn't that in the fall of the year and cotton had gone up considerably?

A No, two days later.

Q Were you there?

A No, sir.

Q You don't know then. You were not present?

A Mr. Covington was there and he also told me—

Q I know, but that's hearsay. That's all.

[fol. 88; Tr. p. 52]

RE-DIRECT EXAMINATION

BY MRS. GOLDMAN:

Q Did you disaffirm the contract yourself?

A Yes, I did. I told Mr. Covington.

Q When did you disaffirm the contract?

A I'd say a week—

BY THE COURT:

I think we're getting off on an issue that is not before the Court at this time.

(Witness excused.)

MR. CRAWFORD:

called as an adverse witness, after first being duly sworn, upon oral examination testified as follows, to-wit:

CROSS EXAMINATION

BY MRS. GOLDMAN:

Q Mr. Crawford, would you state your position with Allenberg Cotton Company to the Court please?

A Secretary-Treasurer.

Q How long have you filled this position?

A In excess of 20 years.

Q Are you familiar with the organization and the details of it?

A Yes, I am.

Q Have you ever qualified the Allenberg Cotton Company to do business in another state?

A In other states, yes.

Q Are you the person who in the firm—

A I would.

Q Who did this .... what system do you use for getting

[fol. 89; Tr. p. 53]

a certificate of authority in a state. Do you first send an inquiry to the—

BY MR. MAYNARD:

We object to that.

BY THE COURT:

Sustained.

Q Do you have a domestic incorporation in any other state beside Tennessee?

BY MR. MAYNARD:

We object to that. That's irrelevant.

BY THE COURT:

I don't understand the significance of your question—do you have a domestic corporation—

BY MRS. GOLDMAN:

Some corporations domesticate rather than qualify—

BY THE COURT:

You didn't say that.

Q Have you domesticated in any state in the union—

BY MR. MAYNARD:

We object to that, Your Honor.

BY THE COURT:

The question here is whether they are authorized to do business in the state of Mississippi.

Q You're familiar with your Articles of Incorporation?

A I think so.

Q Basically your purposes as a corporation are to buy and sell cotton?

A Yes.

Q So you would say that that purpose splits about 50% buying and 50% selling?

[fol. 90; Tr. p. 54]

A Overall, it has to.

Q Or else you don't come out?

A That's the business.

Q And the hedging and things like that you do—

BY MR. BRADLEY:

Objection.

BY THE COURT:

Sustained.

Q Are you familiar with the Mississippi Division of the Allenberg Cotton Company?

BY MR. BRADLEY:

Objection.

BY THE COURT:

Overruled.

A I'm familiar, but there's a lot of specifics that Jerry would carry on in his buying—

BY THE COURT:

Be more specific about what you mean by Mississippi Division.

Q Do you have any separation within your firm according to states?

A Yes.

Q Is the separation according to the business you do

in different states?

A It's according to territories, regions, sections of the country.

Q Do you handle Arizona cotton?

BY MR. MAYNARD:

We object.

BY THE COURT:

I think it's immaterial.

[fol. 91; Tr. p. 55]

Q Are you qualified to do business in other states besides Tennessee?

A Yes.

Q What other states?

A California, Arizona and Texas.

Q Do you do Arizona business in your office in Tennessee?

BY MR. MAYNARD:

We object, Your Honor.

BY THE COURT:

What's the relevancy of that?

BY MRS. GOLDMAN:

The relevancy is that the business which they are doing in Mississippi is duplicated in Arizona, California and Texas and they have qualified to do business in those states.

BY THE COURT:

I don't know whether it's duplicated and I don't know whether the statutes and requirements and desires of one state are the same as another.

BY MR. BRADLEY:

For the Court's information, they maintain offices in those other states.

BY MR. MAYNARD:

The point is, it's irrelevant.

BY MRS. GOLDMAN:

The relevancy of it is that they're carrying out the purposes of the Allenberg Cotton Company according to its domestic incorporation .... in other states as well as Mississippi.

BY THE COURT:

Just to try to move along, I'll let him answer the question, though I think it's immaterial.

[fol. 92; Tr. p. 56]

Q Does your Memphis, Tennessee office contract any Arizona business?

A Yes. Overall, business transactions are governed, controlled, policies set in Memphis. Contracting in those states in which we have qualified, as a foreign corporation, can be and is and at times done locally. But at prices, terms, conditions is set by the policy making people of the company. Now in these states the laws were such that attorneys advised us that we had to qualify with the secretary in order to carry on the transactions that we proposed to do. So we had to qualify with the Secretary of those respective states. And also, any of their requirements—one would be that we had employees in those states.

Q I believe that your employee, Jerry Hill—

BY MR. MAYNARD:

Your Honor, certainly Arizona has nothing to do with this Mississippi case.

BY THE COURT:

I don't think it has anything to do with it.

BY MRS. GOLDMAN:

The thing that I wanted to offer into proof is the fact that Allenberg has carried out the purposes of this corporation in other cotton states—

BY THE COURT:

I'm going to say that the Charter speaks for itself and

I presume that they're trying to carry out the business that is authorized under the charter.

[fol. 93; Tr. p. 57]

Q Do you carry out any of your purposes in other states that you do not carry out in Mississippi? As a corporation?

BY MR. MAYNARD:

Objection, ... same question.

A The situation is different or else we wouldn't have qualified in those states. Their laws are different.

Q There laws are different but don't you always qualify according to the purposes stated in your—

BY MR. BRADLEY:

Objection—legal conclusion.

BY THE COURT:

That's a legal question. Conclusion.

Q Do you qualify according to the purposes—

BY THE COURT:

They couldn't qualify any other way.

BY MR. MAYNARD:

Well, we object to this.

Q I believe you said you answered this interrogatory?

A Yes.

Q You set out in the interrogatory that some of the information on the contract is put in in Mississippi?

A Such as the spelling of a person's name, sometimes, the enumeration of the exact acreage, description and so forth, which might have been lacking or failed to have been put down over the phone in conversation with the local broker.

[fol. 94; Tr. p. 58]

Q Is there any call back to Memphis after this infor-

mation is entered?

A Not that I know of.

Q It is typed onto the contract in the Mississippi office?

A It can be done, if anything is lacking that is necessary to the contract, it could be done by our buyer.

Q How much cotton would estimate that Allenberg has in warehouses in Mississippi?

A I have no way of knowing without taking an inventory. We have a perpetual inventory, that's the nature of our business. It could be determined, found and all, but we do have and handle a fair amount of cotton volume wise, of Mississippi cotton.

Q Have you ever conferred with counsel about qualifying to do business in the State of Mississippi?

A No, because it was not necessary to qualify with the Secretary of State.

Q Have you written the Secretary of State of Mississippi, and had a letter from him—

A I have not.

Q Have you ever made any attempt to qualify in the State of Mississippi?

A No.

BY THE COURT:

I don't think we have an issue on whether they've domesticated as you're using the term—The issue is whether they are doing business in Mississippi within the meaning of the statute.

[fol. 95; Tr. p. 59]

Q Shipping is a great aspect of your selling of cotton, isn't it?

A Yes.

Q Do you ever ship any cotton from Allenberg Cotton

Company in Memphis or is it shipped from the warehouses?

A The orders originate in Memphis, shipping orders, which are bale listings and instructions to warehouses of what bales to pull or break out as they call it—compressed, marked and so forth. Those orders are surrendered to the warehouses in Mississippi along with the respective warehouse receipts for shipment. The interstate commerce carrier to domestic mills, mostly located in Alabama, Georgia, South Carolina and North Carolina and to foreign mills—Europe, Asia, so forth.

Q Is your cotton already sold before it's shipped?

A Yes or we wouldn't be putting it under shipping orders.

Q So, the interstate commerce part is not under your company's control—

BY MR. BRADLEY:

Objection.

Q The cotton is in the control of the mills when it leaves—

A No, no, we have contracted for delivery to a mill in the same manner as we contracted to take delivery from a grower or seller. Now the mill—we don't take title for a mill. We take title of cotton for our own, within our name to fulfill some obligations and contracts we have with mills.

[fol. 96; Tr. p. 60]

Q As I understand the law of shipping, the title transfers to the carrier when the cotton leaves the warehouse?

BY MR. BRADLEY:

Objection.

BY THE COURT:

Sustained. If you want to educate me on what is the law of shipping, I will be glad to hear from you. The

process which you are referring to broadly as shipping involves the sale of cotton and its ultimate transmittal to the buyer, which is as I understand the witness, in their business is usually the one who ultimately uses the cotton for spinning it into yarn and ultimately into cloth, beginning with the processing of it. If you have reference to some specific phase of this shipping, I wish you would be specific about it.

A I would like to add further to this question, that our contracts for sale or for delivery up to the mills' warehouse and foreign mills' port's warehouses and the title doesn't pass until the mills, foreign mills, have paid us for the cotton.

Q Does Allenberg Cotton Company maintain its own interstate carrier?

A No.

Q Has Allenberg ever sued a carrier for damages of cotton?

BY MR. BRADLEY:

Objection.

BY THE COURT:

Sustained.

[fol. 97; Tr. p. 61]

Q Are you familiar with the Pittman cases?

A Only what I have heard in these last few days, beginning last week, as to the specific contracts. But I have become familiar, as all of us have, during this last week or 10 days.

Q Are you familiar with the amendments to the Bill of Complaint that have been made?

BY MR. BRADLEY:

Objection.

BY THE COURT:

Mrs. Goldman, if you have a specific question, please

ask it, and let it be factual.

Q Did you work out the amendments to the bill of complaint in the Pittman cases, which was filed a few days ago?

A No, counsel did.

Q Did you confer with counsel as the Allenberg representative in the working out of details in this amendment?

A I believe my answer to that would be yes. Specifically, I don't know. I'd have to ask counsel to advise me on that.

BY MR. BRADLEY:

May it please the Court, I'm not sure that there are any amendments in this file. In fact, I don't think there are any amendments.

(Off record discussion)

BY THE COURT:

There was a motion made when you raised the question at the hearing last week as to an allegation in the bill as to where the contracts were signed.

[fol. 98; Tr. p. 62]

BY MRS. GOLDMAN:

The allegations in the bill say the contracts were made in Marks, Mississippi, and the first amendment was—the allegation of the first bill was that it was made in Memphis, Tennessee. The first amendment said it was made in Marks, Mississippi. The second amendment said it was made in Marks with the approval of the Memphis, Tennessee office.

BY THE COURT:

Well, now, please don't question this lay witness in detail about what conferences he might have had with his attorney. If there are some factual issues that have been brought to your attention by these amendments or changes

in the pleading, direct your questions, please, to the facts.
BY MRS. GOLDMAN:
My offer of proof with this question was—
BY THE COURT:
Ask him the question.
Q Have the facts in this situation been changed to meet the law?
A To the best of my knowledge, yes.
Q No further questions.

DIRECT EXAMINATION

BY MR. BRADLEY:
Q You answered that the facts had been changed to meet the law. Would you elaborate on that?
A To the best of my knowledge, I'm assuming that counsel would have set forth those things which needed to meet the law.

[fol. 99; Tr. p. 63]

Q Do you know of any facts that have been changed by any of the pleadings or whether the pleadings were made to present facts to the Court?
A The pleadings were made to present the facts, as I see it.
Q All right, with reference to the purchase of cotton. Do you purchase cotton in the State of Mississippi that you don't have sold in interstate commerce before you purchase it?
A No.
Q In other words, all the cotton you purchase is already sold prior to the time you purchase it from growers in Mississippi?
A That's the business we're in.
Q In order we clear the record, in event this record

or this case is appealed, we have talked about offices that your company maintains in other states, or rather the qualification of your company to do business in other states. Are you qualified to do business in any other states where you do not maintain an office?
A No.
Q I believe that's all we have.

RE-CROSS EXAMINATION

BY MRS. GOLDMAN:
Q Is not one of the requirements to qualify to do business in another state, that you maintain an office or an agent within that state?
BY MR. MAYNARD:
We object to that.
BY THE COURT:
Sustain the objection.

[fol. 100; Tr. p. 64]

BY THE COURT:
Our issue here is the relationship to Mississippi, to the parties involved here and the Mississippi statute.
BY MRS. GOLDMAN:
Your Honor, they've brought out that the company maintains offices in other states. It is a requirement of qualification that you must maintain an office in a state.
BY THE COURT:
Well, argue on the law, with your demurrer or whatever. It's not his opinion.
Q Do you maintain offices in any state in which you are not qualified to do business?
A We have some, yes. We have legal, statutory representatives in that state and that's all that's necessary. In fact, the CTC Corporation of New York City is our

legal representative in each of those states. Even though we have an office and an address in each of those states on advice of counsel. These people are our representatives.

Q So your corporation trust is your agent?

BY MR. MAYNARD:

We object to that, Your Honor.

BY THE COURT:

I sustain the objection.

BY MRS. GOLDMAN:

No further questions.

[fol. 101; Tr. p. 65]

BY MR. MAYNARD:

I'd like to ask a few questions.

BY THE COURT:

Is it all right for Mr. Maynard to examine the witness?

BY MRS. GOLDMAN:

I object.

BY THE COURT:

Mr. Bradley...

BY MR. MAYNARD:

I ask permission of the Court to be allowed to examine the witness.

BY THE COURT:

Denied.

BY MRS. GOLDMAN:

No further questions of this witness.

(Witness excused.)

BY MRS. GOLDMAN:

Your Honor, I would like to put counsel for the complainant on the stand. Mr. Bradley.

BY THE COURT:

All right, do you waive oath?

MR. BILL BRADLEY:

counsel for complainant, after first being duly sworn, upon oral examination, testified as follows, to-wit:

CROSS EXAMINATION

BY MRS. GOLDMAN:

Q Mr. Bradley, did you represent the Allenberg Cotton Company in filing a suit against H. T. Pittman previous to the filing of the suit that is under consideration today?

[fol. 102; Tr. p. 66]

A I've represented them on each case.

Q Did you....

BY THE COURT:

Be more specific about the other suit, please.

Q On which the number was 7639 in the Chancery Court of Quitman County? Filed November the 3rd.

A We've filed all lawsuits in Quitman County that have been filed in the past 3 months.

Q Did you state in the bill of complaint in this suit that the Allenberg Cotton Company was a corporation authorized to do business in the State of Mississippi?

BY MR. MAYNARD:

We object to that.

BY MR. BRADLEY:

If it please the Court, this suit's been dismissed—

BY THE COURT:

Sustain the objection.

Q Did you file the bill of complaint against Mr. H. T. Pittman in the Chancery Court of Quitman County No. 7643—

A We've filed all bills of complaint....

Q In the bill of complaint did you state that defendant and complainant entered into a written contract, which was agreed on in Marks, Mississippi on January 28, 1971?

BY MR. MAYNARD:

We object, Your Honor.

BY THE COURT:

Those pleadings, if they're relevant, you can introduce them. Let them speak for themselves, without questioning the attorney. I know, because they were

[fol. 103; Tr. p. 67]

before me in my court, these two suits that were filed, perhaps about a month ago. About seven or eight days before the October or November term of court, I believe it was, in Quitman County. And on the return day, the two suits, one against Mr. Ben Pittman and one against H. T. Pittman, and the complainant appeared and took a voluntary non-suit. The suits were dismissed without prejudice. Now, do those pleadings have any relevance here? I don't think it's wise and I don't think it's proper to put a lawyer on the stand and to cross examine him about how he may have handled some litigation, and the day may come when the person who opened it up might be sorry about it, because there's always somebody who can look back and say—well, you made a mistake.

BY MRS. GOLDMAN:

No further questions. And no further witnesses.

BY THE COURT:

Do you rest?

BY MRS. GOLDMAN:

I rest. I would like to make a motion before this Court that complainant's case be dismissed at this time—

BY THE COURT:

Make it. Don't tell me you'd like to. This Court is open.

BY MRS. GOLDMAN:

I move this Court at this time that this cause of action against the defendant H. T. Pittman be dismissed

[fol. 104; Tr. p. 68]

on the grounds that the Allenberg Cotton Company of Memphis, Tennessee is doing business in the State of Mississippi and is not qualified to do so according to Mississippi law, and so is not entitled to use the courts.

BY THE COURT:

Mrs. Goldman, we were hearing this case on that motion or a similar one. I take it now, you want to deny the complainant the right to be heard. I will not deny the complainant the right to be heard. The motion is denied.

BY MR. BRADLEY:

We'd like to call Mr. Covington back as our first witness.

(Mr. Covington takes the stand and is considered still under oath:)

DIRECT EXAMINATION

BY MR. BRADLEY:

Q Would you state in your own words, who approached whom about the sale of the cotton with reference to Mr. Pittman, Sr.?

A His son. Ben E. Pittman.

BY MRS. GOLDMAN:

Your Honor, I object to that line of questioning since we're hearing the first offense—the second offense, by the choice of the complainant.

BY MR. MAYNARD:

Your Honor, the relevancy of this is perfectly clear. Mr. Ben Pittman left the impression that the first time he

heard about the contract was when Mr. Covington called him to come into the office, and then he stated

[fol. 105; Tr. p. 69]

that he negotiated back and forth with Mr. Hill. Our testimony here is to partially repute that testimony to show that there were no negotiations between Mr. Hill and Mr. Pittman because Mr. Pittman had already agreed on the terms and then sent the message through Mr. Covington, accepted in Memphis, the contract drawn accordingly and sent down here for both Pittmans to sign.

BY THE COURT:

We are still hearing on this question about the part of your pleading of affirmative defense that I've indicated was a plea of abatement and your motion that it be set down for hearing, set for today at this time. We are still on that motion. Mr. Covington will be permitted to testify. Confine your questions please to those phases of his knowledge.

A Ben E. Pittman approached me about a contract. 22¢ for cotton. We talked on this contract. I called Allenberg several times on this contract—the specifics of the contract. It was my understanding that Ben E. was speaking for his cotton and for his father's cotton. I have never talked to H. T. Pittman.

Q Who approached whom about the contract. That's what we want you to explain to the Court?

A Ben E. Pittman approached me.

Q After he discussed this matter with you, what did you do at that time?

A I called Allenberg to see if they could get a contract. They were contracting mainly on so much over the government loan. He wanted a flat price.

[fol. 106; Tr. p. 70]

He wanted a specific price on his cotton, of which they hadn't been used to contracting. That was my understanding. But when they come up with a contract that was suitable for him.

Q Did Allenberg arrive at a figure suitable for all parties?

A They did with Ben E.

Q Was this done prior to the time that Mr. Hill came to the city of Marks?

A It was.

Q That's all we have.

BY THE COURT:

I'd like to be a little more specific about that.

Q Was this agreement, that might have been tentative in nature, had and agreed to between Allenberg Cotton Company in Memphis and with Mr. Pittman in Quitman County, Mississippi, before the contract was signed by Mr. Hill and Mr. Pittman, I believe in your office on the 28th day of January, wasn't it, 1971?

A The prices were agreed upon with Ben E. Pittman. The discounts and whatever, in other words, before were written up. They were understood.

BY THE COURT:

No further questions.

FURTHER DIRECT EXAMINATION

BY MR. BRADLEY:

Q You said they were understood, not only that, but they were reduced to writing, weren't they?

[fol. 107; Tr. p. 71]

A Well, Allenberg reduced them to writing in a contract.

Q That's what I mean . . .

A I never had any dealings with anybody except Ben E. on what he was asking and he was speaking for his father, was my understanding. I called Allenberg and asked them if they could arrive at this contract and Mr. Hill came down later with them. Ben E. was there. His father was not.

Q Were the terms of the contract those which you had submitted to Allenberg and had been approved by Allenberg?

A They were.

Q That's all the questions we have.

CROSS EXAMINATION

BY MRS. GOLDMAN:

Q I believe you said that Mr. Ben E. Pittman approached you?

A Yes.

Q By what do you mean approached?

A He wanted a contract. Wanted to know what he could sell his cotton for.

Q Did you ever mention contracting the cotton to Allenberg before he approached you?

A No.

Q I believe you said that he said he wanted a 22¢ contract?

A Yes'm.

Q That was approved in Memphis?

A It was.

Q The contract he signed was for 21¢. Were you aware of that?

[fol. 108; Tr. p. 72]

A It could have been 20¢. Certain grades. Certain

micronaire. Certain staples—reduced in classes on account of grass and bark, other matter. Cotton could be at different prices, according to the contract. But the contract itself stated 22¢ for cotton with premium micronaire—maybe reduced on account of grass and bark.

Q Did you negotiate the price and all with Mr. Pittman, in Mississippi?

A He understood what he was doing.

Q Did you get from him the information about his acreage?

A Yes. He told me approximately what he had.

Q And then you had Mr. Hill of Allenberg Cotton Company to come to your office and bring the contract?

A He did.

Q And they were signed in Mississippi?

A I don't remember clearly about whether he signed it in my office or signed it in Memphis.

Q There was no communication with Allenberg Cotton Company from your office?

A No'm.

BY THE COURT:

Now, be more specific. Don't be trying to ball the Court, or the record or the witness up. As I understand, witnesses definitely testified that there was communication with Allenberg about the contract. If you have some specifics in mind about it—the communication, please be specific about it.

[fol. 109; Tr. p. 73]

Q Did the contract that you had that Mr. Ben E. Pittman signed in your office, have all the terms on it?

A Yes.

Q And you did in that contract offer to pay Mr. Ben E. Pittman 22¢ for his best cotton?

A That's what the contract reads.

Q You negotiated that price with Mr. Pittman in Mississippi. Is that right?

A Yes.

Q Have you ever approached a farmer and solicited contracts for Allenberg Cotton Company?

A Yes.

Q Have you approached farmers in Marks, Mississippi and in Quitman County, soliciting cotton contracts with Allenberg Cotton Company?

A Yes.

Q No further questions.

(Witness excused.)

(MR. CRAWFORD IS RECALLED TO THE STAND AND IS CONSIDERED STILL UNDER OATH)

DIRECT EXAMINATION

BY MR. MAYNARD:

Q Mr. Crawford, in answer to one of Mrs. Goldman's questions, you stated that most of the cotton which was stored in Mississippi, preparatory to being transported, was transported mostly, and then you named certain states. Was all of it transported in interstate commerce on interstate carriers outside the State of Mississippi, to another state or foreign country?

[fol. 110; Tr. p. 74]

A Yes. All of it.

Q I believe you stated that you had no offices in the State of Mississippi?

A No offices.

Q No agents and no employees?

A No agents and no employees.

Q Is the manner in which Allenberg handles this particular transaction, is that common in the cotton trade?

A As far as we know. All of us do the same thing. We're a highly competitive business.

Q Did Mr. Covington, who's previously testified in this case, did he have any authority from your company to bind your company in any way on the purchase of cotton crops such as the one in this particular Pittman case?

A No.

Q Did he have any authority to agree to any of the terms of any such contract and thus bind Allenberg?

A No.

Q Did he have any right or did he ever exercise any right to sign any contracts with reference to the purchase of cotton crops such as the one in the present Pittman case?

A No.

Q Were any cotton contracts such as the one in this particular case, complete binding or valid without the acceptance and approval of Allenberg Cotton Company in Memphis?

A None.

Q That's all we have.

[fol. 111; Tr. p. 75]

CROSS EXAMINATION

BY MRS. GOLDMAN:

Q Did you state that the Allenberg Cotton Company owned no interstate carriers?

A We do not own any.

Q I believe you stated earlier that the main purposes of the company were buying and selling cotton?

A Yes.

Q I believe you also stated that into these Allenberg contracts some additional information has been typed in

the State of Mississippi, from time to time. Like the acreage?

A There may have been. Could well have been.

Q After that is typed into a contract in Mississippi, is there any communication with the Allenberg Cotton Company in Memphis, before the farmer leaves the office of your representative?

A If it were of a sufficient size, value—about the contract, it would,—yes, but for example, if a general amount of acreage were known by us and the specific amount of acreage was determined locally and turned out to be substantially the same as the general amount that we knew about, then the difference would not have been transmitted to us in Memphis.

Q Has Allenberg ever rejected a contract after it has been filled out and before it is sent to the farmer to be signed?

A We've rejected proposals for sale. But any contract that we have typed up ourselves for the purposes of entering into a contract—we've rejected proposals.

[fol. 112; Tr. p. 76]

We haven't rejected any contracts.

Q So the form that's filled out and sent to Mississippi is a proposal?

A It is a contract as far as we're concerned. We've agreed to enter into it or else we wouldn't have filled out the blank spaces in it.

Q I believe you stated you'd rejected some farmers on the basis of their farming practices?

A Proposals we would reject. A contract is a contract. Once we've agreed to it, orally, as far as we're concerned. It's a mere formality—

BY THE COURT:

I don't think that witness and counsel ought to quibble with themselves or with the Court. A contract, if made, is a contract. It may be breached, but it's hardly rejected. I wish you'd be more specific about what you're talking about.

BY MRS. GOLDMAN:

I'm trying to establish, Your Honor, about whether the printed form that they send to Mississippi—

BY THE COURT:

I think I understand what you're trying to bring out and I think the procedure has been pretty well developed by now.

CONTINUED EXAMINATION

BY MRS. GOLDMAN:

Q I would like to ask you—you say that your company has rejected solicited contracts on the grounds of agricultural practices, reputations of farmers and numerous other reasons. Who gives you the information

[fol. 113; Tr. p. 77]

about this?

A Generally, the local buyer and at times other people in Memphis or other localities that we might know of some specific detail that we wouldn't be interested in or vice versa, that we would be interested in.

Q No further questions.

(Witness excused.)

BY MR. MAYNARD:

We rest.

(Both sides rest)

(Off record Arguments)

BY MRS. GOLDMAN:

I now move the Court, on the evidence that's been submitted in this hearing on behalf of the complainant and the defense, that this cause of action against Mr. H. T. Pittman, be dismissed, on the grounds that the Allenberg Cotton Company is doing business in the State of Mississippi and is not qualified, under the statute, to so do without a certificate of authority.

BY THE COURT:

I'll hear you.

BY MR. MAYNARD:

That's what it's all about, Your Honor.

[fol. 114; Tr. p. 78]

BY THE COURT:

Do you care to present any authority or speak to your motion.

(Off record discussion)

COURT GIVES DECISION and requests Order in compliance, from the Complainant and Defendant.

HEARING CONCLUDED at 4:00 o'clock P.M. November 26, 1971.

IN THE CHANCERY COURT OF QUITMAN COUNTY, MISSISSIPPI

[fol. 114a] (Title omitted in printing)

DECREE

This cause coming on this day to be heard on motion of complainant for temporary injunction against defendant, H. T. Pittman, as set forth in bill of complaint of complainant in this cause, and both parties appearing in Court and being represented by counsel, and the Court having considered the same is of the opinion that said temporary injunction should be granted on complainant's entering into bond of $10,000.00 payable according to law;

The Court finds, and adjudges, orders and decrees that the Allenberg Cotton Company is not doing or transacting business within the State of Mississippi under Section 5309-239 of the Mississippi Code of 1942, annotated, or any other statutes or case law in the State of Mississippi, and therefore may bring its cause of action in the courts of Mississippi and obtain such relief as it may be entitled to.

It is further adjudged, ordered and decreed that the motion of defendant to dismiss this cause of action be, and the same is hereby, overruled.

It is further hereby adjudged, ordered and decreed that the motion of complainant, Allenberg Cotton Company, in the above styled cause for temporary injunction against defendant, H. T. Pittman, be, and the same is hereby, sustained, and that the defendant, H. T. Pittman, his heirs and assigns, be, and they are hereby, enjoined from selling or delivering the cotton as described in the contract made an exhibit to bill of Complaint to any other party

other than to the complainant until further order of this Court.

It is further hereby adjudged, ordered and decreed that said injunction shall not go into effect until complainant has entered into bond as provided by law, and this decree.

[fol. 114b] It is further adjudged, ordered and decreed that the defendant, H. T. Pittman, provide the discovery asked for in the prayer of the complaint, and specifically provide to the complainant information as to the following:

1) The Number of bales produced on the land in question;

2) Class and grade and value of said cotton;

3) Location of said bales of cotton and the location of the warehouse receipts and class cards in connection therewith.

ADJUDGED, ORDERED and DECREED, on this the 26th day of November 1971.

/s/ Partee L. Denton
CHANCELLOR

[fol. 115]

COURT REPORTER'S CERTIFICATE AND COST BILL

I, Joyce M. Lanham, Official Court Reporter for the Seventh Chancery Court District, (2) of Mississippi, do hereby certify that the foregoing 78 pages contain a true and correct transcript of the testimony and evidence offered and received on the hearing in the foregoing cause, as the same was taken down by me in shorthand notes and by electric recorder at the time of the hearing and thereafter transcribed by me to the best of my ability, knowledge and belief.

I further certify that I have today filed the original and one copy of this transcript with the Chancery Clerk of Quitman County, Mississippi, and that I have notified all counsel of record of such filing of said transcript, being the following:

Mrs. Ellen E. Goldman, Marks, Mississippi

Mr. William R. Bradley
Mr. Billy Maynard — Clarksdale, Mississippi

I further certify that my fee for said transcript is the sum of $59.25.

Witness my hand, this the 4th day of April, 1972.

/s/ Joyce Lanham
Official Court Reporter
Seventh Chancery Ct. District (2)

[fol. 116] **COURT REPORTER'S INDEX**

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[fol. 117; Tr. p. 1]

IN THE CHANCERY COURT OF QUITMAN COUNTY, MISSISSIPPI

Regular Term, February, 1972

(Title omitted in printing)

TRANSCRIPT

This case came on to be heard in regular term time of the Quitman County Chancery Court in Marks, Mississippi on the 14th day of February, 1972 at 10:30 o'clock A.M. Present and presiding was the Honorable Partee L. Denton, Chancellor for the Seventh Chancery Court District, Place Two, of Mississippi. The oral testimony and documentary evidence offered during the hearing is contained in this transcript.

[fol. 118; Tr. p. 2]

APPEARANCES:

For the Complainant: Mr. Billy Maynard
Attorney at Law
Clarksdale, Mississippi

Mr. William R. Bradley
Attorney at Law
Clarksdale, Mississippi

For the Defendant: Mrs. Ellen E. Goldman
Attorney at Law
Marks, Mississippi

[fol. 119; Tr. p. 3]

BY MR. BRADLEY:

Come now the parties for the complainant and the defendant and stipulate to the Court as follows: That the

complainant is entitled to recover in this cause and that the only issue is to the measure and extent of damages.

BY THE COURT:

It is in previous rulings of the Court on the plea that complainant was not entitled to seek relief in this court because it did not qualify to do business in the State of Mississippi. That issue and the right to raise that issue hereafter, in connection with this case, is reversed.

(Off record discussion)

BY MR. BRADLEY:

Comes now complainant and defendant and stipulate as follows, with reference to this cause:

1. That the order appearing in Cause No. 7643, Allenberg Cotton Company vs. H. T. Pittman, with reference to the jurisdiction of this matter wherein the Court decided that Allenberg Cotton Company could proceed with its litigation in the State of Mississippi and using the State Courts, also applies in Cause No. 7642, Allenberg Cotton Company vs. Ben E. Pittman, as the testimony introduced in the H. T. Pittman case as to whether or not the complainant has the right to bring a cause of action in the State courts would be the same in both cases. Therefore, the parties stipulate that the finding of the Court in the H. T. Pittman

[fol. 120; Tr. p. 4]

Cause, No. 7643 applies with equal force and effect in the Ben E. Pittman case, No. 7642 and that the effective date as to the Order will be considered to be the date of the decree after the hearing being held today on February 14th, 1972.

(2) The parties stipulate that the only issue before the Court today in the Ben E. Pittman cause, being No. 7642,

is the measure and extent of damages as it is agreed that complainant is entitled to recover.

MR. JERRY HILL:

after first being duly sworn, upon oral examination testifies on behalf of the complainant as follows, to-wit:

DIRECT EXAMINATION

BY MR. BRADLEY:

Q State your name to the Court?

A Jerry L. Hill.

Q Occupation?

A Cotton buyer. Allenberg Cotton Company.

Q How long have you been so engaged?

A 12 years.

Q What are your duties as a cotton buyer?

A In charge of buying cotton in the Memphis territory which consists of Mississippi, Arkansas, Tennessee and Missouri.

Q And what does a buyer specifically do, in addition to that?

[fol. 121; Tr. p. 5]

A (Witness hesitates)

Q We withdraw that question and ask another one. In your work as a cotton buyer, is it necessary that you be familiar with the market prices paid for cotton in this particular territory?

A Definitely.

Q And are you so familiar and have you been throughout the last 10 or 12 years?

A Yes, sir.

Q I call your attention to the contract entered into

between Ben E. Pittman and Allenberg Cotton Company, executed on January 28, 1971, and ask you to state to the Court what the terms of this contract are with reference to the purchase of cotton. First, I'd like for you to say if that is the contract.

A This is the contract. Well, in relation to the price of cotton, the cotton is bought on a micronaire stipulation and it so states in the contract here that the base price for the cotton would be any cotton that falls in the 3-3 to 5-0 micronaire range would be at 22¢. The price is reduced according to micronaire and according to whether they have any grass or reduced cotton in their crop.

Q Assuming that on November 9th, 1971, the defendant sold 534 bales of cotton at 28.90 to a merchant in Greenwood, Mississippi, what would the difference be in the price that you would have acquired the cotton under this particular contract and the price that was paid to the defendant at the sale in Greenwood. Have you computed that?

[fol. 122; Tr. p. 6]

A It would be 690 points—690 points equals $30.00 per bale. Each point represents 5¢ is what it amounts to. It would be $34.00 a bale times 534 bales which he sold, would be $18,156.00.

Q Since it is admitted in Court by the Answer that this was the transaction, what has been the loss to Allenbert, in dollars and cents?

A $18,156.00.

Q That's all the questions we have of this witness.

CROSS EXAMINATION

BY MRS. GOLDMAN:

Q Mr. Hill, are you familiar with the market price

during the month of October and the beginning of November, on cotton?

A I couldn't tell you right here what the price was at that time, no. Without referring to the market sheet of that date.

Q As you recall was there any great variation of price around the first two weeks preceding November 1st? Did the market stay steady during that period?

A It would be hard for me to answer the question without referring to the market sheet.

Q You gave us the price as of what day in November?

A I gave you the price that it was actually sold—November 9th.

Q I would like to ask you at this time about the contract itself. The contract itself shows that you signed this contract on the date that Mr. Pittman signed it. Is that correct?

[fol. 123; Tr. p. 7]

A Right.

Q Did you sign it at the same time that Mr. Pittman signed it?

A I think this has already been established that the contract had already been approved and accepted in Memphis and was brought to Marks for Mr. Pittman's signature and he signed in Mr. Covington's office.

Q And you signed in Mr. Covington's office?

A Right. On January 28th.

Q At the time that Mr. Pittman signed the contract?

A Right.

Q Did the contract become binding at that time?

A The contract was already binding. I mean this had been agreed upon. The contract had to be made up and brought for his signature.

Q The contract was binding without signature?

A Oh no. He read the contract over and if he had not wanted to sign the contract, he did not have to.

Q Both of you signed it in Mr. Covington's office?

A Right.

Q That's all.

(Witness excused.)

MR. W. D. CRAWFORD:

after first being duly sworn, upon oral examination testified on behalf of the complainant, as follows, to-wit:

DIRECT EXAMINATION

BY MR. BRADLEY:

Q State your full name?

A W. D. Crawford.

[fol. 124; Tr. p. 8]

Q And your position with the complainant?

A Secretary-Treasurer.

Q How long have you been with the company?

A Over 30 years.

Q Are you familiar with the buying and selling of cotton in the Memphis territory?

A I am.

Q Is Quitman County part of the Memphis Territory?

A Yes.

Q Have you bought and sold cotton yourself in the Memphis territory as part of this organization?

A Not actually, no.

Q Are you familiar with the prices that have been paid in this territory?

A Yes.

Q Are you familiar with the prices that complainant has bought cotton in the last five years in this territory?

A Yes.

Q You heard the testimony of Mr. Hill with reference to the price of cotton and the terms and conditions of this contract and the amount that he stated that the company lost as a result of the failure of the defendant to deliver cotton as provided in the contract, have you not?

A Yes.

Q Has the testimony that Mr. Hill — is what he said true and correct?

A Yes.

Q That's all we have.

[fol. 125; Tr. p. 9]

CROSS EXAMINATION

BY MRS. GOLDMAN:

Q I show you here the subject contract and I would like to ask you as a representative of Allenberg Cotton Company, to state when this contract became binding ---------- as you heard the testimony of Mr. Hill. He signed this contract at the Covington Cotton Company in Marks, Mississippi, at the same time that Ben E. Pittman signed it. Did this contract become binding from the time of signature?

A Yes.

BY MR. BRADLEY:

We object to that. We don't think that he knows the answer to the legal conclusion.

BY THE COURT:

That is a legal conclusion, but I'll reserve the ruling.

Q That's all I have.

(Witness excused.)

BY MR. BRADLEY:

We have no further witnesses.

BY MRS. GOLDMAN:

Defendant rests, Your Honor.

BY MR. BRADLEY:

Comes now the parties and stipulate that the motion to amend complaint in cause 7643 and 7642 was approved by the Chancellor on the 19th day of November, 1971 in each of the two cases and may be entered now for then.

[fol. 125a]

EXHIBIT #1 By Agreement
2/14/72

IN THE CHANCERY COURT OF QUITMAN COUNTY, MISSISSIPPI

(Title omitted in printing)

MOTION TO AMEND BILL OF COMPLAINT

Now comes complainant and respectfully requests this Honorable Court to be allowed to amend the first sentence of paragraph 3 of said bill of complaint to read as follows:

"The complainant and defendant signed the written contract in Marks, Mississippi on January 28, 1971, after its prior approval by the complainant in its office in Memphis, Tennessee, which approval was necessary for the validity of said agreement. Said agreement is made an Exhibit to this petition wherein complainant agreed to purchase and defendant agreed to sell all cotton produced on approximately 700 acres situated in Quitman County, Mississippi, under the terms and conditions as set forth in the contract."

Respectfully submitted,

MAYNARD, FITZGERALD, MAYNARD AND BRADLEY

/s/ By Wm. H. Maynard
Attorneys for Complainant

[fol. 125b]

EXH #1 (Cont'd)

IN THE CHANCERY COURT OF QUITMAN COUNTY, MISSISSIPPI

(Title omitted in printing)

AMENDMENT TO BILL OF COMPLAINT

On motion of complainant, the following amendment is made to complainant's bill of complaint in the above styled cause:

The first sentence of paragraph 3 of said bill of complaint is amended to read as follows:

"The complainant and defendant signed the written contract in Marks, Mississippi, on January 28, 1971, after its prior approval by the complainant in its office in Memphis, Tennessee, which approval was necessary for the validity of said agreement. Said agreement is made an Exhibit to this petition wherein complainant agreed to purchase and defendant agreed to sell all cotton produced on approximately 700 acres situated in Quitman County, Mississippi, under the terms and conditions as set forth in the contract."

MAYNARD, FITZGERALD, MAYNARD & BRADLEY

By /s/ Wm. H. Maynard
Attorneys for Complainant

[fol. 125c]

Exh #1 (Cont'd)

IN THE CHANCERY COURT OF QUITMAN COUNTY, MISSISSIPPI

(Title omitted in printing)

DECREE ALLOWING AMENDMENT TO BILL OF COMPLAINT

This cause coming on this day to be heard on motion of complainant that it be allowed to amend the first sentence of paragraph 3 of its bill of complaint to read as follows:

"The complainant and defendant signed the written contract in Marks, Mississippi, on January 28, 1971, after its prior approval by the complainant in its office in Memphis, Tennessee, which approval was necessary for the validity of said agreement. Said agreement is made an Exhibit to this petition, wherein complainant agreed to purchase and defendant agreed to sell all cotton produced on approximately 700 acres situated in Quitman County, Mississippi, under the terms and conditions as set forth in the contract."

And the Court being of the opinion that said motion should be allowed, it is therefore, hereby adjudged, ordered and decreed that complainant be, and it is hereby, allowed to amend the first sentence of paragraph 3 of its bill of complaint to read as follows:

"The complainant and defendant signed the written contract in Marks, Mississippi, on January 28, 1971, after its prior approval by the complainant in its office in Memphis, Tennessee, which approval was necessary for the validity of said agreement. Said agreement is made

an Exhibit to this petition, wherein complainant agreed to purchase and defendant agreed to sell all cotton produced on approximately 700 acres situated in Quitman County, Mississippi, under the terms and conditions as set forth in the contract."

ADJUDGED, ORDERED, AND DECREED, this the 19th day of November 1971.

_____

CHANCELLOR

[fol. 125d; Tr. p. 11]

EXHIBIT NO. 2 (by stipulation)

[fol. 125e]

IN THE CHANCERY COURT OF QUITMAN COUNTY, MISSISSIPPI

(Title omitted in printing)

MOTION TO AMEND BILL OF COMPLAINT

Now come complainant and respectfully requests this Honorable Court to be allowed to amend the first sentence of paragraph 3 of said bill of complaint to read as follows:

"The complainant and defendant signed the written contract in Marks, Mississippi, on January 28, 1971, after irs prior approval by the complainant in its office in Memphis, Tennessee which approval was necessary for the validity of said agreement. Said agreement is made an Exhibit to this petition, wherein complainant agreed to purchase and defendant agreed to sell all cotton produced on approximately 500 acres situated in Quitman County, Mississippi, under the terms and conditions as set forth in the contract."

Respectfully submitted,

Maynard, Fitzgerald, Maynard & Bradley

By /s/ Wm. H. Maynard
Attorneys for Complainant

[fol. 125f]

IN THE CHANCERY COURT OF QUITMAN COUNTY, MISSISSIPPI

(Title omitted in printing)

DECREE ALLOWING AMENDMENT TO BILL OF COMPLAINT

This cause coming on to be heard on motions of complainant that it be allowed to amend the first sentence of paragraph 3 of its bill of complaint to read as follows:

"The complainant and defendant signed the written contract in Marks, Mississippi, on January 28, 1971, after its prior approval by the complainant in its office in Memphis, Tennessee which approval was necessary for the validity of said agreement. Said agreement is made an Exhibit to this petition, wherein complainant agreed to purchase and defendant agreed to sell all cotton produced on approximately 500 acres situated in Quitman County, Mississippi, under the terms and conditions as set forth in the contract."

And the Court being of the opinion that said motion should be allowed, it is therefore, hereby adjudged, ordered and decreed that complainant be, and it is hereby, allowed to amend the first sentence of paragraph 3 of its bill of Complaint to read as follows:

"The complainant and defendant signed the written agreement in Marks, Mississippi, on January 23, 1971, after its prior approval by the complainant in its office in Memphis, Tennessee which approval was necessary for the validity of said agreement. Said agreement is made an Exhibit to this petition, wherein complainant agreed to purchase and defendant agreed to sell all cotton produced on approximately 500 acres situated in Quitman County, Mississippi, under the terms and conditions as set forth in the contract."

ADJUDGED, ORDERED AND DECREED this the 19th day of November 1971.

_____
CHANCELLOR

[fol. 125g]

IN THE CHANCERY COURT OF QUITMAN COUNTY, MISSISSIPPI

(Title omitted in printing - H. T. Pittman, Defendant)

AMENDMENT TO BILL OF COMPLAINT

On motion of complainant, the following amendment is to be made to complainant's bill of complaint in the above styled cause:

The first sentence of paragraph 3 of said bill of complaint is amended to read as follows:

"The complainant and defendant signed the written contract in Marks, Mississippi, on January 28, 1971, after its prior approval by the complainant in its office in Memphis, Tennessee which approval was necessary for the validity of said agreement. Said agreement is made

an Exhibit to this petition, wherein complainant agreed to purchase and defendant agreed to sell all cotton produced on approximately 500 acres in Quitman County, Mississippi, under the terms and conditions as set forth in the contract."

MAYNARD, FITZGERALD, MAYNARD & BRADLEY

BY /s/ Wm. H. Maynard
Attorneys for Complainant

[fol. 125h]

C'plainant
EXHIBIT
2-17-72
IML

U. S. DEPARTMENT OF AGRICULTURE
Agricultural Stabilization and Conservation Service

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that the undersigned does hereby make, constitute, and appoint

Ben E. Pittman, of Darling, MS
Quitman County, State of Mississippi

the true and lawful attorney for and in the name, place, and stead of the undersigned in connection with the the [sic] following agricultural programs, numbered 1 , under the jurisdiction of the United States Department of Agriculture, administered through ASC County Committees:

(1.) All Programs
2. Price Support Programs
3. National Wool Programs
4. Emergency Feed Programs
5. Soil Bank Programs

6. Agricultural Conservation Programs
7. Marketing Quota and Acreage Allotment Programs
8. Sugar Programs
9. Naval Stores Conservation Programs
10. Farm Storage Facility Loan Programs
11. Purchase and Diversion Programs Under Section 32 of P.L. 320, 74th Congress
12.

The undersigned gives and grants unto said attorney full authority and power to do and perform all and every act and thing whatsoever requisite and advisable to be done under such programs, including but not limited to, the selling and delivery of a commodity, the signing of an application, the borrowing of money, the receiving of payments, the executing of real or chattel mortgages, the signing of promissory notes, loan and pledge agreements, and all other applicable documents, and the making of reports, as fully to all intents and purposes as the undersigned might or could do if personally present, hereby ratifying and confirming all that said attorney shall lawfully do or cause to be done by virtue hereof.

This power of attorney shall remain in full force and effect until written notice of its revocation has been duly served upon the Quitman ASC County Committee, Marks, Mississippi.

(Over)

[fol. 125i]

The foregoing power of attorney set forth on the reverse side of this page is signed and dated at Marks, Mississippi, this 4 day of March, 1968.

Witnesses: Signatures:

/s/ Mildred L. Greene /s/ H. T. Pittman

ATTEST: (Affix Corporate Seal)

Signature of Corporate Principal[1]

_____

(corporate principal)

_____ By _____

(signature of attesting officer)

_____

(official title)

ACKNOWLEDGMENT[2]

---

[1] If a corporate principal, sign and affix seal in appropriate places; if no corporate seal, so state.

[2] Insert here and have executed the form of acknowledgment required by law of State where property is located with respect to which power of attorney is given.

[fol. 126; Tr. p. 12]

There being no further testimony, the hearing is concluded.

COURT REPORTER'S CERTIFICATE

I, Joyce Lanham, Official Court Reporter for the Seventh Chancery Court District, Place two of Mississippi, do hereby certify that the foregoing 11 pages and this page contain a true and correct transcript of the testimony and evidence offered and received on the hearing in the fore-

going cause, as the same was taken down by me in shorthand notes and by electric recorder at the time of the hearing and thereafter transcribed by me to the best of my ability, knowledge and belief.

I further certify that I have today filed the original and one copy of this transcript with the Chancery Clerk of Quitman County, Mississippi and that I have notified all counsel of record of such filing of said transcript, being the following:

Mrs. Ellen E. Goldman, Marks, Mississippi
Mr. William R. Bradley, Clarksdale, Mississippi
Mr. Billy Maynard, Clarksdale, Mississippi

I further certify that my fee for said transcript is the sum of $9.00.

Witness my hand, this the 4th day of April, 1972.

/s/ Joyce Lanham
Official Court Reporter
Seventh Chancery Ct. District (2)

[fol. 126a]

IN THE CHANCERY COURT OF QUITMAN COUNTY, MISSISSIPPI

(Title omitted in printing)

DECREE

This cause coming on this day to be heard at a day of the Regular Term of the Chancery Court of Quitman County, Mississippi, on Bill of Complaint of Complainant, Allenberg Cotton Company, against Defendant, Ben E.

Decree

Pittman, praying among other things for Defendant to pay for damages alleged to be sustained by Complainant for the Defendants having failed to comply with the cotton sales contract sued upon, and the parties having appeared in Court in person and by their attorneys, and having agreed that Complainant was entitled to recover damages for the failure of Defendant to deliver said cotton to Complainant and that the only question at issue was the amount of damages which Complainant sustained because of Defendant's failure to deliver said cotton, and the Court having heard the evidence with reference to said damages sustained, and the only evidence produced having been by complainant, and said evidence having shown conclusively that there was a damage sustained by Complainant by reason of Defendant's failure to deliver said cotton $18,156.00; and the Court being of the opinion that a decree should be rendered in said amount in favor of Complainant against Defendant.

It is, therefore, hereby adjudged, ordered and decreed that Complainant Allenberg Cotton Company be, and it is hereby awarded damages in the amount of $18,156.00 against Defendant Ben E. Pittman, and all costs of Court.

ADJUDGED, ORDERED and DECREED on this the 14 day of February, 1972.

/s/ Partee L. Denton

[fol. 126b]

IN THE CHANCERY COURT OF QUITMAN COUNTY, MISSISSIPPI

(Title omitted in printing)

PETITION FOR APPEAL

Comes now Ben E. Pittman, the defendant in the above styled and numbered cause and states that there was a judgment or decree rendered against him, from which he desires to prosecute an appeal to the Supreme Court, and he desires to prosecute an appeal without supersedeas.

/s/ Ellen E. Goldman
Attorney for Defendant

FILED
April 6, 1972
James A. Martin Chancery Clerk
By J.A.M. D.C.

[fol. 126c]

ELLEN E. GOLDMAN
ATTORNEY AT LAW
231 CHESTNUT
MARKS, MISSISSIPPI 38646

APRIL 6, 1972

FILED
APRIL 7, 1972
James A. Martin, Chancery Clerk
By J.A.M. D.C.

Mr. James A. Martin
Chancery Clerk of Quitman County
Marks, Mississippi 38646

No. 7642

RE: Allenberg Cotton Company
Vs
Ben E. Pittman

Dear Mr. Martin:

An appeal bond has been filed in the above cited case. Will you please transcribe your records and file the complete record of the Ben E. Pittman case cited above, No. 7642, with the Supreme Court of the State of Mississippi. As a part of the complete record I request that you include the transcript of the preliminary hearing in the H. T. Pittman case, No 7643, which was made applicable to the case No 7642 by direction of the Court.

Thank you very much.

Sincerely yours,

/s/ Ellen E. Goldman
Ellen E. Goldman
Attorney at Law

EEG:dm

[fol. 127]

IN THE CHANCERY COURT OF QUITMAN COUNTY, MISSISSIPPI

(Title omitted in printing)

APPEAL BOND WITHOUT SUPERSEDEAS

KNOW ALL MEN BY THESE PRESENTS, that BEN E. PITTMAN, as principal, and Lloyd C. Lee Jr. and H. T. Pittman, as Sureties, are firmly held and bound unto ALLENBERG COTTON COMPANY. Complainant, in the

penal sum of Five Hundred and No/100 ($500.00) Dollars, to insure cost of the appeal in this case for which payment well and truly to be made we bind ourselves and our successors forever.

The condition of the foregoing obligation is such that, whereas, in the Chancery Court of Quitman County, Mississippi, in the February term of court thereof on the 14th day of February, 1972, judgment against the defendant was rendered in the above styled and numbered cause in favor of ALLENBERG COTTON COMPANY, and said defendant has prayed for and obtained an appeal to the Supreme Court of the State of Mississippi.

NOW, THEREFORE, if the principal obligor shall prosecute said appeal with effect and shall pay all costs of court if the same be affirmed, then this obligation would be void; otherwise, the same shall remain in full force and effect.

GIVEN UNDER MY HAND this the 13th day of March, 1972.

/s/ Ben E. Pittman
BEN E. PITTMAN, Principal

FILED
Mar 13 1972
James A. Martin,
Chancery Clerk
By JAM D.C.

/s/ Lloyd C. Lee, Jr.
Surety

/s/ H. T. Pittman
Surety

APPROVED BY CHANCERY CLERK:

/s/ James A. Martin

[fol. 128]

CERTIFICATE
of
APPEAL AND COST

I, JAMES A. MARTIN, Clerk of the Chancery Court of Quitman County, Mississippi hereby certify the foregoing is a true and correct copy of instruments in the appeal of Cause Number 7642, ALLENBERG COTTON COMPANY versus BEN E. PITTMAN, as per letter to Court Reporter dated February 24, 1972 and to Chancery Court Clerk dated April 6, 1972, said cause docketed in General Chancery Court Docket Number 14 at Page 477 of the records of Quitman County, Mississippi.

I further certify the Court Cost in appeal for

128 Pages -	$68.65
Bindery Fee (inclosed) - - - - - - - - - - - -	2.50
Court Reporter's Cost - - - - - - - - - - - -	68.25
Total	$139.40

This the 10th day of May 1972,

/s/ James A. Martin
JAMES A. MARTIN, Chancery Clerk

The opinion and Judgment of the Supreme Court of Mississippi is included in the Jurisdictional Statement, page A. 1, previously filed.

The Order Certifying Issues Decided in the Supreme Court of Mississippi is found in the Jurisdictional Statement at pages A. 12-A. 13.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-[illegible]

ALLENBERG COTTON CO., INC.,

Appellant,

v.

DELL E. PITTMAN,

Appellee.

On Appeal from the Supreme Court of Mississippi

MOTION TO DISMISS OR AFFIRM

ELLEN B. GOLDMAN
Natchez, Mississippi

ALVIN C. MORGAN
Natchez, Mississippi
Attorneys for Appellee

[illegible]
[illegible]

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OCTOBER TERM, 1973

NO. 73-628

RIVERSIDE PRESS
MEMPHIS, TENNESSEE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-628

ALLENBERG COTTON CO., INC.
Appellant,

v.

BEN E. PITTMAN,
Appellee.

On Appeal from the
Supreme Court of Mississippi

MOTION TO DISMISS OR AFFIRM

The appellee moves the Court to dismiss the appeal on the grounds that appellant failed to properly raise a substantial federal question in the state court proceedings. In the alternative, appellee moves the Court to dismiss the appeal or affirm the judgment of the Supreme Court of Mississippi on the ground that it is manifest that the question on which the decision depends is so insubstantial as not to need further argument.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. THE STATUTE

This appeal raises the question of the application of certain provisions of the Mississippi Business Code pertaining to foreign corporations doing business in the State of Mississippi. Similar to enactment by a majority of states,[1] the code prohibits utilization of courts in the state by foreign corporations transacting business without a certificate of authority from the Secretary of State.[2] Definitional provisions[3] provide exemptions for certain types of commercial activity; the most important for purposes of the present case being the transaction of any business in "interstate commerce."[4]

---

[1]Thirty states have adopted the Model Business Code, including the penalty provision of exclusion from state courts of foreign corporations who do business in a state but who fail to qualify to do so. Note, *Sanctions For Failure to Comply with Corporate Qualifications Statutes: An Evaluation*, 63 **Colum. L. Rev.** 117(1963). This recent commentary concludes that this technique for dealing with foreign corporations is "[T]he broadest and most effective sanction provided for non-compliance". *Id.* at 126.

[2]**Miss. Code Ann.** Sec. 79-3-247 (1972), *formerly* **Miss. Code Ann.** Sec. 5309-239 (1942).

[3]**Miss. Code Ann.** Sec. 79-3-211 (1972), *formerly* **Miss. Code Ann.** Sec. 5309-221 (1942). All sections are identical to those included in the Model Business Corporation Act.

[4]**Miss. Code Ann.** Sec. 79-3-211 (e), *formerly* **Miss. Code Ann.** Sec. 5309-221 (e) (1942). Appellant has now dropped the contention made before the Mississippi Supreme Court that it was entitled to exemption on the basis of subsection (d) which provides that: "Soliciting or procuring orders whether by mail or through employees or agents or otherwise, where such orders require acceptance without this state before becoming binding contracts."

B. THE PROCEEDINGS BELOW

Allenberg is a cotton broker in Memphis, Tennessee.[5] In Mississippi (as in other cotton-producing states)[6] it employs agents on a commission basis to secure contracts specifying prices to be paid for cotton crops to be grown in the future.[7] Pittman owns approximately 700 acres of cropland in Marks, Mississippi. In January, 1971, following conferences with Allenberg's agent, he contracted to deliver his 1971 crop to Allenberg at a designated warehouse in Marks.[8] Delivery of cotton completed the obligation and payment was to be made on the basis of the quality of cotton delivered.[9]

Pittman's failure to comply with the agreement resulted in a breach of contract action[10] brought by Allenberg in the

---

[5]Allenberg emphasizes the importance of the present case in the context of detailed data with respect to the entire marketing industry. *E. g.*, *Jurisdictional Statement* 23 (quoting testimony of Neal P. Gillen, General Counsel of the American Cotton *Shippers* Association). Brokers form a part of the industry represented by this trade association.

Also involved in commercial transactions throughout the United States, however, are local agents, mill buyers, gin owners, shippers, and cooperative marketing associations. *See* United States Department of Agriculture, *The Marketing & Transportation Situation* 12, 16 (ERS-340) (1970); B. Franklin, *Marketing the 1970 Upland Cotton Crop* 13 (GS-253 1971); 53 *Weekly Cotton Market Report* 35 (1972).

[6]Allenberg is qualified in Texas (1971); Arkansas (1973); Missouri (1973); Alabama (1973); Georgia (1973); Louisiana (1973); North Carolina (1973); and South Carolina (1973); *See* Appendix B. On May 29, 1973, it qualified in the state of Mississippi. *Id.* The record also indicates qualifications in Arizona, California, and Texas. (Record at 91). Taking these three steps to comply with the laws of the states in which it is negotiating transactions relating to cotton obviously precludes similar litigation.

[7]The extent of this activity in Mississippi is revealed by the fact that one county alone approximately 25 contracts were signed covering some 9,000 acres for the year 1971. (Record at 51).

[8]The contract also specified that Pittman was to harvest his crop and have it ginned (cleaned) at a gin in Marks specified in the contract. (Record at 7).

[9]The form contract specified a sliding scale of payments geared to the quality of cotton produced. (Record at 7).

[10]The action also requested injunctive relief. (Record at 5).

Chancery Court of Quitman County. Pittman's defense was based on the provisions of the Mississippi Business Code precluding access by foreign corporations to state courts upon failure to secure a certificate of authority to do business in the state. The defense was denied and judgment rendered for Allenberg. On appeal the Mississippi Supreme Court reversed. The opinion concluded that the nature of Allenberg's business, coupled with the specifics of the contract involved (negotiated in the state; intrastate delivery, storage), mandated the conclusion that Allenberg — as a prerequisite to the maintenance of commercial arrangements cognizable and enforceable in the courts of the state — must comply with the statutory requirement of securing a certificate of authority from the Secretary of State.

II. *ARGUMENT*

A. FAILURE TO RAISE A SUBSTANTIAL FEDERAL QUESTION IN THE PROCEEDINGS BELOW REQUIRES DISMISSAL OF THE ACTION.

It is essential to the jurisdiction of the Supreme Court under 28 U.S.C. 1257 that a substantial federal question be properly raised in the state court proceedings.[1] This case does not meet this criteria.

(1) *Certification:* Subsequent to final decision by the Mississippi Supreme Court,[2] Allenberg requested and received an extension in which to file its Jurisdictional Statement. As stated in the motion presented to Mr. Justice Powell:

> The need for this extension arose because of present counsel's uncertainty whether the federal question was timely raised in the Supreme Court of Mississippi. (Appendix A)

Subsequently, a certificate signed by the Chief Justice of the Mississippi Supreme Court was secured. (Jurisdictional Statement 13-14). It states that arguments relating to protections afforded by the Commerce Clause of the United States Constitution were argued and considered. Allenberg now contends that "his certificate is binding upon this Court with respect to the issue of a federal question and the proceedings below. *Jurisdictional Statement 14.*

In cases where it is unclear whether the federal question was raised and/or decided, significant weight will be given to a certificate issued by the *state appellate court.*[3] A certificate signed by a Chief Justice of a state court is an altogether different matter. As stated in *Charleston Fed. Savings & Loan Assn. v. Alderson*, 324 U.S. 182, 186, n. 1 (1945):

> While a certificate of the state court, made part of the record, to the effect that the federal question in issue was decided there is *generally sufficient* to sustain our jurisdiction, when it is consistent with the record . . . *a certificate to the same effect by the presiding justice of the state appellate court does not suffice,* although it may serve to interpret indefinite or ambiguous evidence in the record, relied upon to show that the federal question was raised. (Emphasis added.)

In determining whether the federal question was properly raised, the proceedings below are therefore subject to close scrutiny by this Court.

(2) *Proceedings Before the Chancery Court:* — Pittman asserted a single defense: not having qualified to do business in the state, Allenberg waived its right to use the courts. (Record at 23). After detailed presentation of evidence by

---

[1]Thus, it is necessary, in an appeal under subsection (2), that the validity of a statute must have been "drawn in question." For purpose of certiorari under subsection (3), the validity of a statute must have been "drawn in question" or a federal title, right, privilege or immunity must have been "*specifically* set up or claimed," under the Constitution. (Emphasis added.) Requirements of these sections are substantially identical, **R. Stern & E. Gressman, Supreme Court Practice** Sec. 3.25, at 116 (4th ed. 1969) [hereinafter cited **Stern & Gressman**]

[2]Following a motion for rehearing discussed at p.10, *infra.*

[3]*See, e.g.*, Herb v. Pitcairn, 324 U.S. 117, 128 (1945); **Stern & Gressman,** *supra* note 1, Sec. 3.29, at 128, and cases cited therein; Wolfson & Kurland, *Certificates by State Courts of the Existence of a Federal Question*, 63 **Harv. L. Rev.** 111 (1949).

both sides relating to Allenberg's business activities, the court — without explaining the grounds for decision — ruled against Pittman and entered judgment in the amount of $18,156. (Record at 126a). At no time during the proceedings did Allenberg specifically allege that its activities were protected by the Commerce Clause of the Constitution nor claim invalidity of Pittman's defense on this ground.[4]

(3) *Proceedings Before the Mississippi Supreme Court:* — On appeal, Pittman assigned as error failure of the Chancery Court to dismiss the case on the grounds that Allenberg was not qualified to do business in the state. (Appellant's Assignment of Error at page 1) Under Mississippi practice, Allenberg (having won below) was not required to make a similar delineation of issues raised by the case.[5] Compliance with Rule 15(d)[6] can only be determined by a review of briefs filed.[7]

---

[3]The decree of the Chancellor rested on the singular finding that Allenberg was "doing business" within the State of Mississippi. (Record at 114a). *Jurisdictional Statement* 13. Not having the benefit of a written or oral opinion, one can only speculate as to the legal basis for the decision, *i.e.*, Allenberg was doing business by soliciting orders by agents, engaging in interstate commerce, or some other exception to the requirements of securing a certificate to do business.

It should also be noted that if Allenberg had lost in the trial court, its failure to allege a constitutional claim would have precluded its being raised on appeal. Nationwide Mut. Ins. Co. v. Tillman, 249 Miss. 141, 161 So. 2d 604 (1964); County Bd. of Ed. v. Smith, 239 Miss. 53, 121 So. 2d 139 (1960). "Whether the statute violates section 33 of the Constitution was raised for the first time in this court . . . It was neither presented to, considered, nor passed on, but the trial court. It is a long established rule in this state that a question not raised in trial court will not be considered on appeal . . . ." Adams v. Bd. of Supervisors, 177 Miss. 403, 414, 170 So. 684, 685 (1936).

[4]The Rules of the Mississippi Supreme Court make no such provision.

[5]Requiring specification of the stage in the proceedings in the appellate court at which, and the manner in which, the federal question sought to be reviewed was raised.

[6]This is well within the power of this Court. Beck v. Washington, 369 U.S. 541, 553 (1962) (federal question not adequately presented when mentioned in one sentence of a 125-page brief); Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308, 313 n. 6 (1968) (noting failure to raise the issue in brief before state appellate court). *But see, e.g.*, Zadig v. Baldwin, 166 U.S. 485 (1897) (briefs and oral argument before state supreme court not to be considered.)

Pittman argued as a matter of Mississippi law that Allenberg was a foreign corporation doing business in the state without a certificate and therefore not entitled to access to the courts.[8] Allenberg's brief responds with the contention that "strict construction" of the Code is in order.[9] It continues in much the same tone, distinguishing Mississippi cases[10] and arguing for a compatible construction of the code itself.[11]

The final portion makes reference to the term "interstate commerce" in the context of its inclusion in the Mississippi

---

[8]The entire presentation on behalf of Pittman related solely to Mississippi cases and the wording of the Mississippi Business Code.

[9]"**Miss. Code Ann.** Sec. 5309-239 . . . outlines the penal sanctions imposed upon a foreign corporation, transacting business within this state without having previously qualified. The sanction includes the denial of access to the state courts of Mississippi for the prosecution of its claims. Since the statute is penal in nature, it must be strictly construed [citing Mississippi precedent] . . . . It logically follows that being a vital element of the application [of the statute] . . . the determination of what constitutes transacting business must be made in a manner which protects the rights of the corporation which is to be punished by such a finding. This determination is controlled by **Miss. Code Ann.** Sec. 5309-221. . . ." (Brief for Appellant, Mississippi Sup. Ct. 4).

[10]*E. g.*, Davis-Wood Lumber Co. v. Ladner, 210 Miss. 863, 50 So. 2d 615 (1951).

[11]But one does not have to deal in inferences or stretch legislative intention beyond all imagination to see that the Mississippi Business Corporation Act plainly, on its face, says that a foreign corporation is not doing business in the state by soliciting contracts by agents or otherwise when the contracts require acceptance without this state before becoming binding. The *law of this state prior to the enactment* of the Model Business Corporation Act was completely in harmony with the position urged (by Allenberg) [citing a long line of Mississippi cases]. . . ." (Emphasis added).

This portion of the brief is, in turn, followed by noting a diversity case decided by the Northern District of Mississippi. Its applicability is stressed as correctly construing the Mississippi Code "following previous Mississippi authority." Brief for Appellant, Miss. Sup. Ct. at 10. The case is Humboldt Foods, Inc. v. Massey, 297 F. Supp. 236 (N.D. Miss. 1968).

Code[12] and not as to the interpretation given to it in cases construing Art. I, Sec. 8, *i.e.*, "commerce . . . among the several states." Following a reiteration of the facts of the transaction in issue (with the conclusion that this constituted a delivery *within the meaning of* of the Mississippi Business Code)[13] Allenberg terminates the body of its presentation with the following analysis:

> [Pittman] further argues that the intent of the legislature in enacting the statues under analysis was to protect the citizens of this state. Surely this is true with regard to every statutory enactment of that body. But appellant's argument is clearly inapplicable to the decision of this tribunal in that, as has been heretofore cited, the instant situation being listed as an exception to the general statutory rule, *clearly is controlled by that statute which appellant himself attempts to invoke.* Id. at 14 (Emphasis added.)

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[12] "[Allenberg] further contends that the contract giving rise to the instant action was interstate in nature. Therefore, under subsection (e) of **Miss. Code Ann.** Sec. 5309- 221 . . . the appellee is specifically excepted from the application, of the body of, the statute . . . ." Brief for Appellant, Miss. Sup. Ct. at 11. The threshold proposition is followed by quotations from **AM. JUR.** 2d relating to purchases of goods and interstate commerce. Notably, this is the only portion of the brief (other than remarks in the "Conclusion" section) that gives *any* indication of reliance by appellant on a construction of the Mississippi statute other than that which has been given by the Mississippi Supreme Court.

[13] "[C]are must be taken to make reference to the particular clause of the federal constitution . . . as well as the rights claimed thereunder. **Stern & Gressmann,** *supra* note 1, Sec. 3.26 at 117. The issue of whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question. Street v. New York, 394 U.S. 576 (1969). A general allegation of the commerce clause is obviously insufficient. O'Neil v. Vermont, 144 U.S. 323 335 (1895). *See also* Herndon v. Georgia, 295 U.S. 441, 442-43 (1935) (reference to "Constitution of the United States" insufficient); Bowe v. Scott, 233 U.S. 658, 664-65 (1914) (taking of property "without due process of law"; no reference to United States Constitution, insufficient).

A parallel situation exists when claims are made under either the equal protection or due process clause where a state constitution contains a similar provision. In this situation it is clear that jurisdiction does not exist unless the federal provision is clearly specified. *See* New York v. Zimmerman, 278 U.S. 63 (1928).

The summary clearly indicates that at *no point* in its presentation did appellant lay claim to Art. I, Sec. 8, and the controlling federal construction given to the Commerce Clause.[14] The reply brief filed by Pittman responds only on matters of Mississippi law.

(4) *The Opinion of the Mississippi Supreme Court:* — Any deficiency in the particularity with which a federal issue is framed is cured if the highest state court assumes that a specific federal issue is properly before it and then expressly considers and determines that issue. *Saltonstall v. Saltonstall,* 276 U.S. 260, 267-8 (1928). If, however, the state court does no more than discuss the interpretation of the state statute without considering such interpretation in light of *federal* constitutional provisions, this Court cannot consider the federal points. *Beck v. Washington,* 369 U.S. 541, 549-550 (1962).

The Mississippi Supreme Court — in accord with the arguments of the parties — cites no precedent by this Court in its decision. Appellant's presentation containing only sparse reflection on the term "interstate commerce" in the context of the statutory term of the Mississippi Code is only mirrored by the Mississippi Supreme Court opinion and its utilization of "interstate commerce".[15]

In *Central Greyhound Lines v. Mealey,* 334 U.S. 653 (1948), the state contended that appellant's constitutional claims with respect to the application of a gross receipts tax

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[14] The fact that the opinion (viewed in light of the arguments made) is insufficient for jurisdictional purposes becomes clear in the context of a theoretical holding against Pittman, *i.e.*, Allenberg's activities fall within the "interstate commerce" exception of the Mississippi Code. Without specifying direct reliance on Art. I, Sec. 8, an "adequate state ground" would exist, precluding review by this Court. *See* Department of Motor Vehicles v. Rios, 410 U.S. 425 (1972) (invalid termination of driver's license; state and federal due process); California v. Krivda, 409 U.S. 33 (1972) (search found unreasonable; state provision paralleling fourth amendment).

[15] *Cf.* United States v. O'Brien, 391 U.S. 367, 383-84 (1968); Ely, *Legislative & Administrative Motivation in Constitutional Law,* 79 **Yale L.J.** 1205 (1970).

had not been raised before the New York Appellate Court. In rejecting this contention, the Court found the following factors persuasive: (1) Raising of the constitutional issue in the intermediate court system; and (2) The appellate court's conclusion that "there is no *constitutional* objection to taxation of total receipts here. This is not interstate commerce . . . ." 334 U.S. at 655. (Emphasis added.)

At no point in the proceedings below did Allenberg specifically claim protections afforded by the Commerce Clause. The Mississippi Supreme Court alluded to "interstate commerce," only in the context of interpreting the statutory provision as found in the Mississippi Business Code. Without more, the conclusion is that the state court was interpreting its own state law without the benefit of specific claims relating to federal rights.[16]

(5) *The Petition for Rehearing:* — On motion for on for rehearing, the appellant — *for the first time* — brought into play constitutional precedent as established by this Court, *i.e.* the case now relied upon in support of its Jurisdictional Statement, *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921). The motion was denied without opinion. The raising of specific federal claims in this context is not sufficient to vest this Court with jurisdiction. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *Hanson v. Denckla*, 357 U.S. 235, 243-4 (1958); R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE Sec. 124, 83.27 (4th ed. 1969).

(6) *Conclusion:* — Counsel for Pittman conducted the entire litigation below on the assumption that the Mississippi Business Code and interpretive decisions by the Mississippi Supreme Court were controlling precedent. As indicated by

[16]A further consideration in the case is the fact that both sides were represented by competent counsel. Quite obviously, considerations relating to whether or not a federal question has been explicitly and correctly raised will differ according to the status of the litigants. *Compare* Gideon v. Wainwright, 372 U.S. 335 (1963) *with* D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 188 (1972).

the reason given for requesting an extension of time to file its Jurisdictional Statement and as conclusively demonstrated by the record made below, counsel for Allenberg conducted their portion of the litigation in a similar manner. Without having briefed or argued federal precedent the contention is now espoused that the certificate issued by the Chief Justice of the Mississippi Supreme Court is conclusive with respect to a sequence of events which never occurred. Under the controlling precedent of *Charleston Savings & Loan*, however, this certificate can only be utilized to "interpret indefinite and ambiguous evidence in the record, relied upon to show that the Federal question was raised." The evidence is not vague and indefinite; all references to "interstate commerce" (prior to the petition for rehearing) were to the term as utilized in the Mississippi Code, not the Commerce Clause. The certificate should be given no weight and the case dismissed.[17] If this Court concludes that the question argued in the case warrants its attention, it is suggested that the case be held pending a certification by the Mississippi Supreme Court as to the grounds for the decision.[18]

B. ALLENBERG'S BUSINESS ACTIVITIES ARE SUFFICIENTLY INTRASTATE AS TO REQUIRE SECURANCE OF A CERTIFICATE OF AUTHORITY.

The provisions of the Mississippi Business Code are formulated in a manner consistent with the state's exercise of its general police powers.[19] They are only applicable to cor-

[17]Finally, and with respect to the present certification, it should be noted that the opinion below was written by Justice Smith and not the Chief Justice. In Wolfson & Kurland, *Certificates by State Courts of the Existence of a Federal Question*, 63 **Harv. L. Rev.** 111, 117 (1949), policy considerations against single-judge certification are succinctly analyzed: "[T]here is good reason for not giving conclusive effect to the certificate of a state court's presiding or chief justice. One judge's understanding of the case does not necessarily reflect the understanding of the court. Many times in recent years a court has disrupted the understanding of the judge who authored the opinion."

[18]*Ibid.*

[19]Note, 79 **U. Pa. L. Rev.** 1119, 1121-23 (1931).

porations having sufficient contacts with the jurisdiction, *i.e.*, "doing business" to ensure that the state's interest in regulation required to qualify.[20] "Doing business", however, is not a phrase of art; rather it is a test of reasonableness to be applied in light of governing legal policies.[21] As pointed out by the appellant,[22] a lesser amount of business is required to justify taxation than is necessary to compel qualification, and still a smaller amount will suffice to render the foreign corporation amenable to service of process. In the present case the record conclusively shows that Allenberg — having thousands of acres under contract and resulting crop yields stored in innumerable warehouses in the state in its own name — is doing "sufficient business" to warrant the exercise

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[20]Pro forma requirements are set forth in **Miss. Code Ann.** Sec. 79-3-255 (1972), *formerly* **Miss. Code Ann.** Sec. 5309-262 (1942), *e.g.*, completing application form, paying of filing fee (minimum of $25; maximum $500), filing of annual reports.

[21]*See* Hutchison v. Chase & Gilbert, Inc., 45 F 2d 139, 142 (2d Cir. 1930); **Caplin, Doing Business In Other States** iii (1959). Generally, it may be said that for purposes of qualification the business done should involve continuity of act and purpose. *See, e.g.*, William L. Bonnell Co. v. Katz, 23 Misc. 2d 1028, 196 N. Y. S. 2d 763 (Sup. Ct. 1960); City of St. Louis v. Pub. Serv. Comm'n, 355 Mo. 448, 73 S. W. 2d 393 (1934). Isolated acts, or those of an unusual nature, generally will not constitute sufficient contact to require qualification unless they indicate an intention on the part of the corporation to engage in further activity of a substantial nature. *See, e. g.*, Wilson v. Williams, 222 F. 2d 692, 697 (10th Cir. 1955). Mississippi interpretation is in accord. Isolated transactions are insufficient; business performed must be substantial for purposes of the qualification provision. Snipes v. Commercial & Indus. Bk., 225 Miss. 345, 82 So. 2d 895 (1955), Newell Contracting Co. v. State Highway Comm'n., 195 Miss. 395, 15 So. 2d 700 (1943); Peterman Const. & Supply Co. v. Blumenfeld, 156 Miss. 55, 125 So. 548 (1930).

The interpretation given to the "interstate commerce" exception is also in accord with existing precedent. *See* Smith v. J. P. Seeburg Corp., 192 Miss. 563, 6 So. 2d 591 (1942) (interstate sales of phonographs; no certificate required); Morrison v. Guar. Mort. & Trust Co., 191 Miss. 207, 199 So. 110 (1940) (interstate loan transactions). *Cf.* Reichman-Crosby Co. v. Stone, 204 Miss. 122, 37 So. 2d 22 (1948).

[22]*Jurisdictional Statement* 22n. 34.

of state power in all three areas.[23] The spectre of "interstate commerce" is now raised to claim immunity from qualification.

The law is clear on the subject. William Meade Fletcher, after noting the general rule that purchases of goods by foreign corporations for shipment to another state constitutes interstate commerce,[24] states:

> A mere purchase in the state, however, without a shipment outside the state does not constitute interstate commerce, *and a purchase is not in interstate commerce where the transaction is complete before interstate commerce begins, and the purchase makes no provision as to shipment to the foreign corporation outside the state.* (17 W. FLETCHER, CYCLOPEDIA CORPORATIONS 374-5 Sec. 8415 (1960)).[25]

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[23]Issacs, *Analysis of Doing Business*, 25 Colum. L. Rev. 1018 (1925); Kinnally, *What Constitutes Doing Business by a Foreign Corporation?*, 15 **Ind. L. J.** 520 (1940); Note, *Corporate Registration: A Fundamental Analysis of "Doing Business"*, 71 **Yale L. J.** 575 (1962). **Caplin, Doing Business in Other States** (1959).

[24]*Citing* Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921).

[25]In State v. Pioneer Creamery Co., 211 Mo. App. 116, 245 S. W. 362 (1922), an agent for the foreign corporation purchased cream, placed it in a storeroom and subsequently shipped it to the corporation in another state where it was turned into butter. Noting that the contracts of purchase called for intrastate delivery with a delay prior to interstate transit, the court rejected the contention that the business was interstate and therefore no certificate for doing business was required. The respondent's argument was conceptualized as follows: "It would naturally follow that every kind of business transacted in this state for the purchase of material of any kind, which was afterwards shipped to another state . . . would or could be made interstate commerce. The business transacted by the defendant in this state was separate and distinct from interstate commerce, and subject to the laws of this state governing foreign corporations." 245 S.W. at 363.

A contrasting situation is exemplified by Seneca Tex. Corp. v. Missouri Flower & Feather Co., 119 S. W. 2d 991 (Mo. App. 1938), where a foreign corporation was held subject to qualification when it shipped goods from the foreign state to warehouses within the state requiring qualification. Filling of orders from customers from this facility held to be an intrastate business. *See also* John I. Haas, Inc. v. Ellis, 227 Ore. 170, 361 P. 2d 820 (1961). (Excise tax imposed on hops brought from farmers stored prior to intrastate shipment.)

In accord with this precedent, the Mississippi Supreme Court separated Pittman's role in growing, ginning and delivering his cotton crop to the warehouse in Marks, from the true interstate nature of Allenberg's business, *i.e.*, delivery at some future time of Pittman's (and other farmer's) cotton from the warehouse to plants in other states.

The singular thrust of Allenberg's argument is that the transaction in question fits squarely in the mold provided by the early case of *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921). However,

DAHNKE	*ALLENBERG*
1. Mill shipment,mill contract, i.e., Contract specified for delivery in foreign state. (Page 286)	1. Contract with purchaser ended at warehouse in state of production. (Record at 7)
2. Delivery aboard common carrier stated and agreed upon in contract. (Page 286)	2. Warehouse delivery to purchaser, no knowledge by seller of any further movement. (Record at 7)
3. Custom and usage — over and over mill bought for shipment to mill from the same farmer, farmer in one state, mill in the other. (Page 292)	3. A first arrangement, even Allenberg's agent in Marks did not know what would happen to the cotton. (Record at 23)
4. Buyer and seller knew wheat was going to another state. (Page 287)	4. No knowledge on the part of the seller. Vague claims on part of the buyer. Buyer claims he sold cotton before he bought it. (Record at 99)
5. Transportation involved. (Page 286)	5. Transportation not involved. (Record at 7)
6. No storage. (Page 287)	6. Indefinite storage. (Record at 7)

The court in *Dahnke* stressed the fact that delivery of the wheat was to be on board the cars (a "unitary interstate transsaction".)[26] and that the plaintiff, in continuation of its prior practice, was purchasing grain for shipment to its mill in Tennessee. As described: "what otherwise seemed an intrastate transaction was a part of interstate commerce." *Id.* at 292. The small number of cases decided by this court on the specific issue of refusal by a state to open its judicial system to foreign corporations failing to qualify further point to the correctness of the decision below.

In accord with *Dahnke* it is clear that where a transaction involves interstate commerce in a pure schematic sense, any exercise of state power is invalid.[27] As with most situations falling within a Commerce Clause analysis, a finding of localized activities sufficiently *disassociated* with actual transportation in interstate commerce itself,[28] will provide a sufficient nexus for the exercise of state power.[29] Two cases

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[26]As characterized in Union Brokerage Co. v. Jensen, 322 U.S. 202, 211 (1944); *accord* Humboldt Foods v. Massey, 297 F. Supp. 236 (N.D. Miss. 1918) (direct sale *via* interstate shipment to foreign corporation).

[27]Sioux Remedy Co. v. Cope, 235 U.S. 197 (1914) (authorizing suit by foreign corporation to demand and enforce payment on goods shipped from Iowa to defendants place of business in South Dakota); International Text Book Co. v. Pigg, 217 U.S. 91 (1910) (authorizing suit by foreign corporation against Kansas resident owing money on a correspondence course).

[28]Temporary halts, occurring either before, during or after an interstate journey constitute a well-settled factual setting for the exercise of state power. The crucial test in all circumstances, of course, is that of "continuity of transit". Carson Petroleum Co. v. Vail, 279 U.S. 95, 101 (1929). "[B]y reason of a break in transit, the property may come to rest within a state and become subject to the power of the state . . . ." Minnesota v. Blasius, 290 U.S. 1, 9 (1933). In Independent Warehouses v. Scheele, 331 U.S. 70 (1947), this Court upheld a license tax for the storage of coal alleged to be in interstate transit. *See also* United Airlines v. Mahin, 410 U.S. 623 (1973).

[29]As stated in Union Brokerage v. Jensen, 322 U.S. 202, 211 (1944): "We have considered literally scores of cases in which the states have exerted authority over foreign corporations and in doing so have dealt with aspects of interstate and foreign commerce. Whatever may be the generalities to which these cases gave utterance and about which there has been said, on the whole, relatively little disagreement, the fate of state legislation in these cases has not been determined by these generalities but by the weight of the circumstances and the practical and experienced judgment in applying these generalities to particular instances."

are in point.

In *Union Brokerage Co. v. Jensen*, 322 U.S. 202 (1944), a customshouse brokerage business (facilitating the importation of merchandise) was denied access to the Minnesota court system on the grounds that it failed to qualify. The Court found that the Company had established a local office necessary for the transaction of interstate business. The most recent analysis by this Court is found in *Eli Lilly & Co. v. Sav-on-Drugs*, 366 U.S. 276 (1961). While alluding in dictum to the traditional rule that the Commerce Clause precludes a state from requiring a foreign corporation transacting solely interstate business to qualify, 366 U.S. at 278, the Court found promotional and service activities collateral to the company's interstate business (drug sales) sufficient to disallow utilization of the state's court system without first having secured a certificate of authority.[30]

Since this Court has not faced the present factual situation with respect to certification requirements, it is appropriate to conceptualize the type of contracting activity engaged in by

[30]An analysis similar to that found in *Eli Lilly* was earlier used by the Arkansas Supreme Court: "It has been ruled by this court that a foreign corporation comes within the purview of the statutes referred to in case they do any intrastate business so far as that character of business is concerned, even though they also engage in interstate commerce or business . . . A foreign corporation cannot avoid or circumvent the statutes by engaging in interstate business along with local or intrastate business. In other words, the courts will not permit a foreign corporation to camouflage an intrastate business with interstate business so as to avoid the penalty imposed by the statutes for doing an intrastate business without complying with the law." Sunlight Prod. Co. v. State, 183 Ark. 64, 35 S.W. 2d 342, 343 (1931).

Allenberg in the context of other exercises of state power.[31] The most feasible is state taxation, an activity recently described in the following manner.

> [When] pieces and segments of an interstate business are taxed . . . [this Court's] *cases reveals discrimination* in approving or disapproving taxes that may be imposed . . . [T]axes which "are aimed at or discriminate against (interstate) commerce or *impose a levy for the privilege of doing it, or tax interstate transportation and communication . . . or levy an exaction on merchandise in the course of its interstate journey are within the ban,* since they may "so readily be made an instrument of impending or destroying interstate commerce." *United Airlines, Inc. v. Mahin*, 410 U.S. 623, 636 (1973) (Douglas, J. Dissenting). (Emphasis added.)

The threat of taxation of interstate commerce, and the destruction thereof, is no less than the statutory penalty for noncompliance with provisions relating to the necessity for securing a certificate of authority. As shown by *Dahnke-Walker*, a free-wheeling exercise of this latter authority is perfectly capable of stopping interstate commerce in its tracks. It naturally follows that an exercise of state taxing power passing the careful "discrimination" given by this Court meets similar requisites on the issue here considered. Two cases dealing with the exact factual situation in a taxing

[31]Allenberg places great reliance on Shafer v. Farmer's Grain Co., 268 U.S. 189 (1925), to bolster its conclusions with respect to the legal ramifications of the *Dahnke-Walker Milling Co.* case. That case, however, involved an attempt to regulate grain buyers already subject to the United States Grain Standards Act. Utilizing a modified balancing test (Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), the Court found no adequate justification for the exercise of state power and concluded that it constituted a "direct interference" with interstate commerce. The Supreme Court of South Dakota describes the decision as dealing with an enactment primarily designed to regulate "buying for interstate shipment". In re Farmers Cooperative Ass'n., 69 S. D. 191, 8 N. W. 2d 557 (1943); *accord* Townsend v. Yeomans, 301 U.S. 441 (1937) (state statute fixing maximum charges for handling leaf tobacco a proper exercise of police power).

context are conclusive as to the distinct intrastate functions at issue.

In *Federal Compress Co. v. McLean*, 291 U.S. 17 (1934), the validity of a state excise tax as applied to a cotton warehouse and compress business was attacked as interfering with interstate commerce, since some of the cotton was ultimately to be shipped to out-of-state buyers. The Court, distinguishing *Dahnke*, upheld the validity of the tax, stating that before *shipping orders* are given, the cotton has not ascertainable destination without the state. "Here the privilege taxed is exercised before interstate commerce begins, hence the burden of the tax upon the commerce is too indirect and remote to transgress constitutional limitations." 291 U.S. at 22. Noting appellant's contract with a rail carrier, the Court concludes:

> It is not within the power of the parties, by the descriptive terms of their contract, to convert a local business into an interstate commerce business protected by the interstate commerce clause. 291 U.S. at 22.

In the case of *Chassaniol v. City of Greenwood*, 291 U.S. 584 (1934), it was urged that an ordinance taxing "every person engaged in the business of buying and selling cotton" violated the Commerce Clause. Rejecting an argument strikingly similar to that utilized by Allenberg, the Court stated:

> The argument is that already at that time the cotton was destined for ultimate shipment to some other state or country; and that to tax the occupation of the cotton buyer burdens interstate commerce, since the buyer at Greenwood is the instrumentality by which the interstate transaction is initiated. The business involved is substantially like that described in *Federal Compress* . . .; and the rule there declared must govern here. *Ginning cotton, transporting it to Greenwood and warehousing, buying and compressing it there, are each, like the growing of it, steps in preparation for the sale and shipment in interstate or foreign commerce. But*

> *each step prior to the sale and shipment is a transaction local to Mississippi, a transaction in intrastate commerce* . . .There is nothing in *Dahnke-Walker Milling Co. v. Bondurant* . . . . or in *Lemke v. Farmers Grain Co.* inconsistent with this conclusion . . . . 291 U.S. at 586-7[32] (Emphasis added.)

Allenberg finds itself in a position similar to the Eli Lilly Drug Company. Its cause of action is on a contract entirely separable from any particular interstate sale and its business activities are separable: intrastate and interstate. The intrastate aspects give rise to a valid exercise by the state in requiring that a certificate of authority be procured. Failure to do this subjects Allenberg to "the broadest and most effective sanction provided for noncompliance . . . the refusal to allow use of state courts for actions instituted by an unlicensed corporation." Note, *Sanctions for Failure to Comply with Corporate Qualifications Statutes: An Evaluation* 63 COLUM. L. REV. 117, 126 (1963).

C. CONSIDERATIONS OTHER THAN THOSE UTILIZED BY THE COURT BELOW ARE SUFFICIENT TO UPHOLD THE DECISION

Relying primarily on this Court's decisions in *Union Brokerage* and *Eli Lilly*, a substantial body of secondary authority concludes that the "interstate commerce" exception to state qualification provisions may have outlived its

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[32] In Interstate Commerce Comm'n v. Columbus & G. Ry., 153 F. 2d 194 (5th Cir. 1946), a railroad engaged a trucker to conduct seasonal business of transporting cotton from gin to warehouse and compress. The cotton was transported for the grower, on delivery to warehouse negotiable receipts were issued and the cotton remained in the warehouse for a period of from six to eight months before it moved on the rail carrier in interstate commerce. The Interstate Commerce Commission sought to enjoin the operation pending requirements with federal law. Construing the statute on the basis of *Federal Compress* and *Chassaniol*, the Fifth Circuit held that activity to be intrastate in nature and not subject to ICC regulation.

usefulness.[33] There is much to be said for determining the validity of such a qualification statute by weighing the burdens imposed on interstate business against the benefits foreign corporations receive from transacting business within the state. Similar "balancing tests" have been widely applied in amenability to process[34] and tax[35] cases.

If such a "balancing test" were to be applied, it is submitted that in a majority of cases that benefits accruing to foreign corporations would far outweigh the "burdens" or inconveniences imposed on interstate commerce, and, therefore, the application of qualification statutes to foreign corporations which conduct solely interstate business would be held to be constitutional.

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[33] "[T]here are indications that interstate commerce may no longer serve as a barrier to qualification." 17 **W. Fletcher, Cyclopedia Corporations** Sec. 8422 at 387 (perm. ed. rev. repl. 1960). *See* 2 **G. Hornstein, Corporation Law And Practice** 53 (1959); **H. Henn, Corporations And Other Business Enterprises** 116, 118, 127 (1961). Apparently anticipating a change in this general rule, the Hawaiian statute at one time provided that a foreign corporation transacting solely interstate and foreign business could nevertheless be forced to qualify. **Hawaii Rev. Laws** Sec. 174-2 (1955). This section was repealed and presently the statute is in accord with the general rule. **Hawaii Rev. Stat.** Sec. 418-7(9) (1968), *formerly* **Hawaii Rev. Laws** Sec. 174-7.5 (i) (1957). *See generally* Note, *State Regulation of Foreign Corporations: Qualification: Interstate v. Intrastate Business; Eli Lilly & Co. v. Sav-on-Drugs, Inc.*, 47 **Corn L. Q.** 300, 301-02 n. 12 (1962).

[34] International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945): "But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protections of [state] laws . . . [These activities] may give rise to obligations, and so far as those obligations arise out of . . .the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances be hardly said to be undue."

[35] Northwestern States Portland Cement Co. v. Minnesota 358 U.S. 450, 461-62 (1959): "[Interstate commerce is not immune] from carrying its fair share of the costs of the state government in return for the benefits it derives from within the state." Braniff Airways v. Nebraska, 347 U.S. 590, 601 (1954): "Nebraska certainly affords protection during such [interstate airplane] stops and these regular landings are clearly a benefit to [the corporation]. . . ."

A "benefit" is obviously anything which contributes to profit or advantage.[36] Laying aside the critical distinctions previously drawn between Allenberg's intrastate and interstate activities, a shift in focus to a second set of depositive criteria clearly points to the "benefits" resulting from corporate entrance and utilization of Mississippi resources for purposes of profit.

(1) Access has been given to trade in the state's major agricultural commodity;

(2) Utilization of facilities throughout the state for ginning, transporting and classification of cotton;

(3) Utilization of the same facilities for warehousing pending shipment in interstate commerce.

(4) Protection afforded to cotton (while warehoused in Allenberg's name) by city and county police and fire departments.

The importance of these "benefits" to businesses such as Allenberg's cannot be underestimated. As they relate to a viable business structure and the profit incentive, these "benefits" are critical to the present capability of this company to carry on a business for profit. Indeed, those activities occurring in the state of New Jersey in the *Eli-Lilly* case cannot even begin to claim the economic impact of what now occurs in the State of Mississippi with respect to Allenberg.

On the basis of the foregoing, it is respectfully submitted that a separate and distinct analysis supports the decision below. The result being eminently correct, the appeal should be dismissed.

III. CONCLUSION

Wherefore, Appellee respectfully submits that the

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[36] One writer utilizes the following analysis: "All foreign corporations transacting business within a state receive at least the following benefits: (1) income derived from such business; (2) protection of state laws under which they conduct such business; (3) opportunity to employ, to borrow money from, and to float securities among state citizens or domestic corporations in the conduct of such business."Note, *supra* note 33.

questions upon which this cause depends are so insubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of the State of Mississippi.

Respectfully submitted,

ELLEN E. GOLDMAN
ANNA C. MADDAN
Attorneys for Appellee

George Colvin Cochran
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of Appellee's motion to Dismiss or Affirm has been furnished to John McQuiston, II, 1400 Commerce Title Building, Memphis, Tenn.

ELLEN GOLDMAN

Appendix A

IN THE SUPREME COURT OF THE UNITED STATES

ALLENBERG COTTON COMPANY, INC.,
Appellant

v.

BEN E. PITTMAN,
Appellee

APPLICATION FOR AN EXTENSION OF TIME

TO MR. JUSTICE LEWIS F. POWELL, JR., CIRCUIT JUSTICE:

I. Application is hereby made for an extension of time within which the Allenberg Cotton Company, Inc. may docket the case, enter counsel's appearance, pay the docket fee, and file its statement of jurisdiction or petition for certiorari, and otherwise perfect its appeal to the Supreme Court of Mississippi on May 14, 1973 (a copy of which is attached and incorporated by reference herein).

II. Applicant respectfully requests said extension to and including November 12, 1973.

III. Contemporaneously with the making of this application, Allenberg Cotton Company, Inc. is filing a Notice of Appeal to the Supreme Court of the United States in the Supreme Court of Mississippi, a copy of which is attached.

IV. The need for this extension arose because of present counsel's uncertainty whether the federal question was timely raised in the Supreme Court of Mississippi. A preliminary decision was made not to take an appeal or to petition for certiori. Counsel has been informed that the question was raised, and this extension of time is requested in order to accord counsel an opportunity to secure a certificate from the

Supreme Court of Mississippi to that effect. Lynum vs. Illinois, 368 U.S. 908 (1961).

GOODMAN, GLAZER, STRAUCH
& SCHNEIDER

By William W. Goodman

By John McQuiston, II
Attorneys for Allenberg Cotton Company, Inc.

CERTIFICATE OF SERVICE

I, William W. Goodman, one of the attorneys for Allenberg Cotton Company, Inc., depose and say that on the 3rd day of August, 1973, I served a copy of the foregoing Application for Extension of Time on the attorneys for Ben E. Pittman by depositing copies of the same in the United States mails, first class postage prepaid addressed to the Hon. Ellen E. Goldman, P.O. Box 88, Marks, Mississippi, 38646, and to the Hon. Anna C. Maddan, Cliff Finch Bldg., Batesville, Mississippi, 38606.

William W. Goodman

Subscribed and sworn to before me at Memphis, Tennessee this 3rd day of August, 1973.

Stephen H. Biller
Notary Public

My commission expires: January 21, 1975.

Appendix B

B. 1

THE STATE OF TEXAS

SECRETARY OF STATE

I, MARK W. WHITE, JR., Secretary of State of the State of Texas, DO HEREBY CERTIFY that the attached is a true and correct copy of the following described instruments on file in this office:

Application for Certificate of Authority for ALLENBERG COTTON COMPANY, INC., a Tennessee corporation, for which a Certificate of Authority to transact business in the State of Texas for the purposes set forth in the application.

IN TESTIMONY WHERE, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in the City of Austin, this 29th day of October, A.D. 1973.

Mark W. White, Jr.
Secretary of State

SEAL

B. 2

STATE OF ARKANSAS

DEPARTMENT OF STATE

Kelly Bryant, Secretary of State

To All to Whom These Presents Shall Come, Greeting. I, Kelly Bryant, Secretary of State of the State of Arkansas, do hereby certify that the following and hereto attached instrument of writing is a true and perfect copy of

ALL QUALIFICATION DOCUMENTS
ON FILE IN THIS OFFICE

FOR

ALLENBERG COTTON COMPANY, INC.

Qualified in Arkansas: September 4, 1973

In Testimony Whereof I have hereunto set my hand and affixed my official Seal Done at office in the City of Little Rock, this 26th day of October, 1973.

KELLY BRYANT
Secretary of State

By HELEN BOOK
Deputy

SEAL

B. 3

STATE OF MISSOURI

JAMES C. KIRKPATRICK, Secretary of State
CORPORATION DIVISION

CERTIFICATE OF AUTHORITY

WHEREAS, ALLENBERG COTTON COMPANY, INC, (using in Missouri the name ALLENBERG COTTON COMPANY, INC.) incorporated under the Laws of the State of Tennessee for a term of perpetual years and now in existence and in good standing in said State has filed in the office of the Secretary of State, duly authenticated evidence of its incorporation, as provided by law, and has, in all respects, complied with the requirements of General and Business Corporation Law governing Foreign Corporations;

NOW, THEREFORE, I, JAMES C. KIRKPATRICK, Secretary of State of the State of Missouri, by virtue of the authority vested in me, do hereby certify that said corporation is from the date hereof duly authorized to carry on the business of (See Application) in the State of Missouri, and is entitled to all rights and privileges granted to Foreign Corporations under The General and Business Corporation Law; that the entire amount of its stated capital and surplus is $4,000,000 and $883,000 of the amount of stated capital of said corporation is represented by 17,678 shares of common + no par that the proportion of stated capital and surplus represented in Missouri is $ (none) and that its registered office in Missouri is located at 314 North Broadway, St. Louis.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the GREAT SEAL of the State of Missouri, at the City of Jefferson, this 4th day of September, 1973.

JAMES C. KIRKPATRICK
Secretary of State

RECEIVED OF ALLENBERG COTTON COMPANY, INC. Sixty-three and no/00 dollars, $63.00 For Credit of General Revenue Fund, on Account of Incorporation Tax and Fee.

DOROTHYMAE MILLER
Deputy Collector of Revenue

No. F-164030

SEAL

THE STATE OF ALABAMA

DEPARTMENT OF STATE

I Mabel S. Amos, Secretary of State, of the State of Alabama, having custody of the Great and Principal Seal of said State, do hereby certify that the foreign corporation records on file in this office disclose that Allenberg Cotton Company, Inc., a Tennessee corporation, qualified in the State of Alabama on September 6, 1973. I further certify that the records do not disclose that said Allenberg Cotton Company, Inc. has been withdrawn.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State, at the Capitol, in the City of Montgomery, this 15th day of November, One Thousand Nine Hundred and Seventy-three.

MABEL S. AMOS
Secretary of State

SEAL

UNITED STATES OF AMERICA

STATE OF LOUISIANA

WADE O. MARTIN, JR.

I, the undersign Secretary of State, of the State of Louisiana DO HEREBY CERTIFY that a certified copy of the Articles of Incorporation and Amendments of

ALLENBERG COTTON COMPANY, INC.

A Tennessee corporation domiciled at Memphis,

Certified as a true and correct copy on August 15, 1973, by the Secretary of State of Tennessee.

Was filed and recorded in this Office on September 14, 1973, in the Record of Charters Book 303,

Thus authorizing the corporation to exercise the same powers, rights and privileges accorded similar domestic corporations, subject to the provisions of R. S. 1950, Title 12, Chapter 3, and other applicable laws.

In testimony whereof, I have hereunto set my hand and caused the Seal of my Office to be affixed at the City of Baton Rouge on, September 14, 1973.

WADE O. MARTIN, JR.
Secretary of State

SEAL

STATE OF NORTH CAROLINA

DEPARTMENT OF THE SECRETARY OF STATE

To all to whom these presents come, Greeting:

I, Thad Eure, Secretary of State of the State of NorthCarolina, do hereby certify the following and hereto attached (2 sheets) to be a true copy of

APPLICATION FOR CERTIFICATE OF AUTHORITY
OF
ALLENBERG COTTON COMPANY, INC.

the original of which is now on file and a matter of record in this office.

In Witness Whereof, I have hereunto set my hand and affixed my official seal.

Done in Office, at Raleigh, this 30th day of October in the year of our Lord 1973.

THAD EURE
Secretary of State

By CLYDE SMITH
Deputy Secretary of State

SEAL

APPLICATION BY FOREIGN CORPORATION FOR AUTHORITY TO TRANSACT BUSINESS IN THE STATE OF SOUTH CAROLINA

OFFICE OF THE SECRETARY OF STATE

Filed: September 21, 1973

Pursuant to Sec. 13.2 of the South Carolina Business Corporation Act of 1962, the undersigned corporation hereby applies for authority to transact business in the State of South Carolina, and for that purpose, hereby submits the following statement: (12.23.2 Supplement Code 1962)

(1) The name of the corporation is ALLENBERG COTTON COMPANY, INC.

(2) It is incorporated under the laws of the state of Tennessee.

(3) The date of its incorporation is 3/14/46 and the period of its duration is perpetual.

(4) The nature of business which the corporation is authorized to do in its home state is: Cotton merchants.

(5) The nature of business which the corporation proposes to do in the state of South Carolina is: Cotton merchants.

(6) The address of the registered or principal office of the corporation in the jurisdiction of its incorporation is 104 S. Front St. in the city of Memphis and state of Tennessee.

(7) The address of the proposed registered office in the state of South Carolina is 409 East North Street, in the city of Greenville, South Carolina 29602.

(8) The name of the proposed registered agent in this state at such address is C T CORPORATION SYSTEM.

(9) The aggregate number of shares which the corporation

has authority to issue is 80,000.
b. Total authorized capital stock $ No Par 80,000 No Par Shares.

(10) The aggregate number of shares which the corporation has issued is as follows: (itemize by class, par value and series if any)

No. of Shares: 80,000
Class: Common
Par Value: None

(11) The stated capital of the corporation is $883,900.

September 14, 1973

ALLENBERG COTTON COMPANY, INC.

DAVID C. BRANDON
Secretary

By BEN K. BAER
President

CERTIFICATE OF ATTORNEY

(12) I, C. Lewis Rasor, Jr., an attorney licensed to practice in the State of South Carolina, certify that in my opinion the corporation, to whose application for authority this certificate is attached, has complied with the requirements of Chapter 13, of the South Carolina Business Corporation Act of 1962, (12-23.2 b-2) Supplement Code 1962) relating to the qualification of Foreign Corporations.

Date: September 20, 1973

SCHEDULE OF FEES:
(payable at time of filing application with Secretary of State). Fee for filing application: $5.00 in addition to the above, $.40 for each $1,000.00 of the aggregate value of shares

which the corporation is authorized to issue, but in no case less than $40.00 nor more than $1,000.00

C. LEWIS RASOR, JR.
409 East North Street
Post Office Box 2048
Greenville, S.C. 29602

NOTE:
This form must be completed in its entirety before it will be accepted for filing and accompanied by a copy of its articles of incorporation and all amendments thereto or in lieu thereof, if provided for by its jurisdiction of incorporation, the corporation may furnish a restated or consolidated articles or charter duly authenticated by the proper officer of its jurisdiction of incorporation.

STATE OF TENNESSEE
COUNTY OF SHELBY

The undersigned Ben K. Baer and David C. Brandon do hereby certify that they are the duly elected and acting President and Secretary respectively, of ALLENBERG COTTON COMPANY, INC. corporation and are authorized to execute this verification; that each of the undersigned for himself does hereby further certify that he has read the foregoing document, understands the meaning and purport of the statements therein contained and the same are true to the best of his information and belief.

Dated at Memphis, Tennessee, this 14th day of September, 1973.

BEN K. BAER
President

DAVID C. BRANDON
Secretary

NOTE: This certificate has been prepared for execution by

the president (or vice president) and secretary (or assistant secretary). It may be executed by any of the persons enumerated in section 1.4 (12-11.4 Supplement Code 1962) of the South Carolina Business Corporation Act under the circumstances indicated. If anyone other than the president (or vice president) and secretary (or assistant secretary) executes the form, the wording of this verification should be changed accordingly.

STATE OF MISSISSIPPI

OFFICE OF
SECRETARY OF STATE
JACKSON

CERTIFICATE

I, HEBER LADNER, Secretary of State of the State of Mississippi, and as such the legal custodian of the corporate records, required by Chapter 4, Title 21, Recompiled Code of Mississippi of 1942, as amended, to be filed in my office, do hereby certify that

ALLENBERG COTTON COMPANY, INC.

a corporation, duly chartered under the laws of the State of Tennessee, has filed a duly certified copy of its charter of incorporation in this office and has obtained a certificate of authority to do business in this State, under the provisions of Chapter 4, Title 21, Recompiled Code of Mississippi of 1942, as amended, and as shown by the records in this office. (Qualified to do business in Mississippi on May 29, 1973.)

I further certify that said corporation has filed in this office an appointment of registered agent for service of process, with written acceptance endorsed thereon, and/or power of attorney, designating as its agent and/or attorney for service of process in this State, C T CORPORATION of 118 North Congress Street, Jackson, Mississippi.

I further certify that said Corporation has paid the fees for filing the above papers required by law as shown by the records of this office, and that said corporation is in good standing to do business in Missisippi at this time.

Given under my hand and Seal of Office, this the 29th day of October, 1973.

HEBER LADNER
Secretary of State

73-628

Supreme Court, U. S.
FILED
OCT 11 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73

ALLENBERG COTTON COMPANY, INC.,
Petitioner,

v.

BEN E. PITTMAN,
Respondent.

On Appeal from the
Supreme Court of Mississippi

BRIEF FOR THE AMERICAN COTTON SHIPPERS ASSOCIATION AS AMICUS CURIAE

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IN THE

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October Term, 1973

No. 73

ALLENBERG COTTON COMPANY, INC.,
Petitioner,

v.

BEN E. PITTMAN,
Respondent.

On Appeal from the Supreme Court of the State of Mississippi

BRIEF FOR THE AMERICAN COTTON SHIPPERS ASSOCIATION AS AMICUS CURIAE

AUTHORITY TO FILE

This brief amicus in support of the position of the petitioners is filed by the American Cotton Shippers Association with the consent of the parties as provided for in Rule 42(2) of the Rules of this Court.

INTEREST OF THE AMERICAN COTTON SHIPPERS ASSOCIATION

The American Cotton Shippers Association is a trade association of cotton merchants, shippers and exporters of raw cotton.[1] The association was founded in 1924 and is incorporated under the laws of the state of Tennessee. The association is authorized to cooperate and treat with Cotton Exchanges, Cotton Shippers Associations, Cotton

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1 A. B. Cox, Cotton - Demand, Supply, Merchandising (Hemphill's, Austin, Texas 1953), pp. 202-205.

... The over-all central organization in the cotton merchandising system for United States grown cotton is the American Cotton Shippers Association, incorporated under the laws of Tennessee on June 8, 1924.

Functions and activities of the American Cotton Shippers Association extend into many fields. It can best be described as an organization devoted to solution of problems of the cotton trade and industry. It performs its services through the establishment of equitable rules and trading relations with cotton manufacturers in spinners' markets in promoting equitable rules and procedures for buying cotton in local markets and in negotiating with foreign markets for American cotton in such matters as standardization of trade practices, adoption of suitable rules and trading procedure, and of settling disputes.

This association represents the cotton trade in matters of public relations. It has as one of its functions the expansion of markets for American cotton by removing difficulties in the way of the sale of American cotton such as now exist in most countries of the world. Sometimes it is a matter of finance which involves working out sound principles of financing sales with funds of the Export-Import Bank in the United States. Sometimes it involves determining with banks or governments abroad the amount of risks the merchants themselves must carry. In short, the American Cotton Shippers Association is preeminently the spokesman, the negotiator, of the American cotton trade in merchandising of American raw cotton not only in this country but throughout the world.

The Association negotiates trading rules with manufacturers to govern trading and settlement of disputes in spinners' or manufacturers' markets to which it jointly subscribes. It is the agency which represents the United States cotton trade in establishing trading relations in foreign markets. This Association represents the spot cotton trade in suggesting rules and trade practices in futures markets. It is the official spokesman for the spot cotton trade before various government agencies and departments. It helps to standardize trade practices among the Association's federated members insofar as practicable.

Buyers Associations, Cotton Manufacturer Associations, Compresses, Gins and individuals in the United States and in any foreign country in evolving rules, regulations, and practices governing the cotton trade which shall be fair to all concerned; and is authorized to engage in all such activities in connection with the cotton industry as come within the province of a trade association [Articles of Incorporation. Art. 2] including the right to sue and be sued by the corporate name [Art. 3].

The 492 members of the association derive their status through membership in one of five federated associations,[2] such associations doing business in sixteen states throughout the cotton belt:

Arkansas-Missouri Cotton Trade Association
Atlantic Cotton Association
Southern Cotton Association
Texas Cotton Association
Western Cotton Shippers Association

Of the total U. S. cotton crop the member firms handle over 70% of the raw cotton sold to domestic textile mills and export 80% of the U.S. crop sold in foreign markets.

---

2 ARTICLE 8.

"That this Association shall be a Federation of Cotton Shippers' Associations and any Association of cotton shippers in the United States shall be eligible to membership; each member of each cotton shippers' association belonging to the American Cotton Shippers Association shall be deemed a member of the American Cotton Shippers Association, unless otherwise provided in the disciplinary By-Laws of this Association, except that no individual firm or corporation engaged in buying and selling cotton shall be entitled to membership in the American Cotton Shippers Association except through membership in, or the express approval of, the federated member association within whose jurisdiction is located the principal office of such shipper, or in the case of affiliated cotton shippers the principal office of the controlling affiliate, . . ."

Four cooperative marketing associations and textile mill buyers control the remaining portions of these markets.[3]

Cotton merchants have a bifurcated function of buying and selling cotton. The merchants purchase and assemble millions (approximately 13 million in 1973) of individual bales of cotton offered for sale by approximately three-hundred thousand farmers producing cotton in sixteen states across the cotton belt. Over 18 varieties of U.S. cotton are produced in several hundred combinations of quality and staple lengths (due to the various types of seed, soil, weather conditions, and harvesting practices). The merchant classes each bale according to the quality factors and assembles the cotton of the same grade, staple length, color and character into even-running lots in warehouses at various locations in the different states. Cotton is sold to textile mills in spinners' markets in even-running lots at various times and delivery is made to locations designated by the various textile mills. The merchant also performs the function of storing and concentrating cotton and the financing of surplus spot cotton including the excess ginnings over consumption during the major harvest months.[4]

The commercial function of the cotton merchant, the involvement of members of this association, in the purchase and sale of cotton directly involves them to a substantial degree in the transacting of business in interstate commerce. The ruling of the Supreme Court of Mississippi

---

[3] Hearings before the Subcommittee on Agricultural Exports of the Committee on Agriculture and Forestry, United States Senate, Ninety-Second Congress (First Session) on "The Situation Regarding Agricultural Exports In Light Of The Current Labor-Management Dispute In The Shipping Industry", November 5, 1971, at p. 80.

[4] In years of excessively high carryovers the Commodity Credit Corporation performs the storage and sale function for cotton taken over by the U.S. Government on loans forfeited by individual cotton producers.

directly affects the continued orderly transacting of the business of the members of this association; and that decision was decided in a way not in accord with the applicable decisions of this Court. In light of these considerations, the interest of the American Cotton Shippers Association is manifest.

ARGUMENT

The facts giving rise to this litigation are succinctly reviewed in the Brief of Allenberg Cotton Company, the appellant, and reference is made here only to the effect that the manner of doing business therein is typical of industry practices. There is, in fact, nothing about the transaction out of the ordinary. Its significance lies in the fact that, should this transaction be made unenforceable by reason of the law made in this case, the industry itself stands upon quicksand, in danger of being brought to rest by an interpretation of law inconsistent with business practice.

The importance of the question here presented cannot be urged too strongly. Cotton is the nation's fourth leading crop worth more than $2.2 billion annually in income at the farm level, and more than $12.2 billion at the retail level. In 1971, 5.1 billion pounds of cotton was sold in the United States. In the same year, consumption of cotton equalled 19 pounds per capita within the United States, while $584 million dollars worth of cotton was being exported. More than 5.5 million persons live wholly or in part upon incomes derived directly from cotton, and another 12.8 million depend for their livelihood upon jobs related to cotton processing and manufacturing.[5]

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[5] COTTON TODAY, a publication of the National Cotton Council of America.

Allenberg Cotton Company had entered into a contract to purchase all of the cotton produced on the Ben C. Pittman farm, a practice which is a relatively recent innovation, sometimes called "forward contracting." This practice has led to an expansion of cotton planting with the manifold benefits to everyone, by permitting the farmer to know that he can produce at a profit and assuring the merchant of a supply to meet commitments at a known price. The farmer incurs no added risk by virtue of such a contract. In fact, he eliminates from that point on any risk to him of subsequent drops in the market price. In addition, his contract is worth money to him at his local bank, where it provides collateral for financing his farming operations. The significance of the practice was recently stressed by the Department of Agriculture:

> WASHINGTON, Sept. 7 . . . Citing increased use of forward contracting in cotton marketing, a top administration farm official today called on farmers and buyers "to preserve the marketing relationship they have been building in order to strengthen this marketing technique for the crop years ahead."
>
> Kenneth E. Frick, Administrator of the U. S. Department of Agriculture's Agricultural Stabilization and Conservation Service, said "This marketing tool has become increasingly popular among farmers and buyers since the 1970 crop season when 11% of the upland cotton crop was sold ahead. A recent USDA survey shows that 45% of the 1973 crop acreage was contracted ahead up from 32% for the previous crop. Forward contracting can be very important in marketing the 1974 cotton crop and future crops before they are planted.
>
> "Forward contracting can be an essential tool in turning the corner away from Commodity Credit Corporation

ownership of commodities and to Treasury payments," Mr. Frick said. "I hope farmers and processers can build a new demand chain concept in agricultural marketing to replace the forty year old production curtailment philosophy and the entrenched dependence by processers on the U. S. government to carry reserve backstop inventories of farm products.

"With the August 10 signing by President Nixon of the Agriculture and Consumer Protection Act of 1973, and Secretary Butz' subsequent early announcements of the basis provisions of all the major commodity programs for the spring of 1974, U. S. farmers already have the crop production rules for the year ahead," Mr. Frick said. "Farmers are now in a position to plan ahead and they are ready to produce for the marketplace. But the farmer must receive his signals from the market—from the domestic processer, from the trader and the foreign buyer—in order to complete his plans.

"Lines between the producer and buyer should taut and smooth enough that a demand pool will result in a production increase to meet consumer needs," Mr. Frick said.

"During the last forty years of restrictive agriculture, stocks of wheat, feed grain and cotton have been acquired and held year after year at taxpayers' expense in Commodity Credit Corporation (CCC) storage bins. The government has been performing an inventory function for the trade and has been serving as a market for farmers for more than a generation. Today's generation of processers and farmers is accustomed to utilizing CCC, and I expect that some of them will have real difficulty in adjusting to the new environment," Mr. Frick said.

"These are days not to be caught in our habits," Mr. Frick concluded. "These are days to look forward to marketing systems that suit the needs of the farmer. This is the time for farmers to work harder than ever before to move into the markets of the world and then hold on to the gains they have made."[6]

The practice is also urged by the National Cotton Council of America which explained the importance of forward crop contracting as follows:

> Yet without a contract, what incentives does the farmer have to plant cotton, and what can he offer his source of production credit as assurance that his loan will be repaid? His government payment? Yes, but that covers only the effective allotment—less than 9 million acres in 1973 and not nearly enough to supply a normal market.
>
> What beside a crop contract can secure the financing of those needed acres beyond the allotment? The loan? The present loan level of about 20-1/2 cents for SLM 1-1/16", which is about the average of the crop, won't even cover out-of-pocket costs—much less total costs—for over half the nation's production. The most recent USDA cost survey showed only 45.8 percent of the crop produced at a 'direct' cost of less than 21 cents, and only 16.8 percent at a total cost of less than 21 cents.[7]

In the instant case, however, the Mississippi Supreme Court, by an exceedingly restrictive ruling, has claimed

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6 USDA News Release No. 2771-73; See also USDA News Release No. 2956-73.

7 Dabney S. Wellford, **The Economic Outlook for U. S. Cotton**, report before the Thirty-Fifth Annual Meeting of the NATIONAL COTTON COUNCIL OF AMERICA, January 29, 1973.

for the local State the privilege to govern by its laws this normal conduct of cotton crop contracting which this Brief submits is an activity of interstate commerce. Such impairment of contracts carried on in interstate commerce is highly significant and potentially very damaging to the cotton industry.

The statutes which prescribe the steps a foreign corporation must follow in order to have the right to transact business within Mississippi are typical[8] with the exception that in Mississippi, as in only a very few other States, a corporation must have received its certificate of authority prior to the time a cause of action arises in order to maintain suit on that cause of action. There are 19 cotton producing states in the United States. Allenberg buys cotton in seven of them, and other member firms of the American Cotton Shippers Association purchase cotton in as many as

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8 The procedures for qualifying to do business in Mississippi are found in Sections 5309-221 through 5309-317 of the Mississippi Code 1942 Annotated. In order to procure a certificate of authority, a corporation must first submit an application to the Secretary of State, setting forth, among other things: a statement of the number of authorized shares itemized by class and par value; the number of issued shares by class and par value; a statement of the amount of the stated capital of the corporation; an estimate of the value of all property owned by the corporation and an estimate of the value of all property of the corporation within Mississippi; an estimate of the gross business to be conducted by the corporation for the year and an estimate of the business to be transacted within Mississippi; "such additional information as may be necessary or appropriate in order to enable the Secretary of State to determine whether such corporation is entitled to a certificate of authority to transact business in this state and to determine and assess the fees payable as in this Act prescribed". The fee for issuance of the certificate of authority is $25.00 for the first $5,000.00 of capital stock and $2.00 per $1,000.00 additional above $5,000.00, not to exceed $500.00. Additionally, in order to maintain its qualification, a foreign corporation must file annually with the Secretary of State a report of: the character of the business conducted by the corporation within Mississippi; the names and addresses of the directors and officers of the corporation; the number of authorized shares; the number of issued shares and the amount of stated capital of the corporation.

14 States in one given year. It can be readily seen that to require a merchant to achieve and maintain qualification in a dozen or more States in which its only activities consist of buying commodities to be shipped in interstate commerce would constitute a substantial and possibly prohibitive burden on the interstate marketing of cotton.

It is a well settled principle of law that a State cannot impose a direct burden on interstate commerce. *Gibbons v. Ogden.*[9]

It is equally well settled that to condition the right of a foreign corporation to obtain judicial relief in a State's courts upon such corporation's first obtaining a "certificate of authority" to do business within the State, constitutes, in the case of those corporations engaged in interstate business, a regulation of and direct burden upon interstate commerce. *International Text Book Co. v. Pigg.*[10] The Mississippi Legislature recognized this proposition and, in enacting Section 106 of Chapter 235 of the Public Statutes of Mississippi, inserted the following provision:

> . . . a foreign corporation shall not be considered to be transacting business in this state, for the purposes of this Act, by reason of carrying on in this state any one or more of the following activities:
>
> * * *
>
> (e) Transacting any business in interstate commerce.

It is insisted that the Mississippi Supreme Court, in holding that as a matter of law, Allenberg was not engaged in interstate commerce, committed error and in so doing,

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9 **Gibbons v. Ogden**, 9 Wheat. 1, 6 L. Ed. 23.

10 **International Text Book Company v. Pigg**, 217 U.S. 91, 54 L. Ed. 678.

substantially deprived Allenberg of its constitutional right to prosecute its interstate business unfettered by State regulation. This decision is not only against the tide of law which has broadened rather than restricted the concept of interstate commerce, but is inconsistent with even the older cases of the court.

The United States Supreme Court, in *Dahnke-Walker Milling Co. v. Bondurant*,[11] a case factually similar to the one at bar, held:

> . . . when goods are purchased in one state for transportation to another, the purchase is interstate commerce, quite as much as is the transportation.[12]

In this case, Dahnke-Walker Milling Company, a Tennessee corporation, contracted to purchase wheat from a farmer in Kentucky. The contract of sale was made in Hickman, Kentucky, and called for payment upon delivery of the wheat on board a common carrier there. It was buyer's customary practice to purchase Kentucky commodities in this fashion for shipment to its mill in Tennessee, the buyer having, in fact, made several previous purchases from this particular farmer. When the market price rose above the contract price, the farmer sold his wheat elsewhere, and the buyer brought suit. Dahnke-Walker had not, prior to entering the contract, qualified to do business in Kentucky.

The buyer's suit in the Kentucky court was dismissed on the basis that, as in the instant case, the activity involved intrastate commerce for which corporate qualification was required, rather than interstate commerce.

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11 **Dahnke-Walker Milling Company v. Bondurant**, 257 U.S. 282, 66 L. Ed. 239.

12 **Dahnke-Walker v. Bondurant**, supra at P. 290.

On appeal, the United States Supreme Court reversed. In reaching its decision, the Court stated:

> The State Court stressing the fact that the contract was made in Kentucky and was to be performed there, put aside the further facts that the delivery was to be on board the cars [of a common carrier], and that the plaintiff in continuance of its prior practice was purchasing the grain for shipment to its mill in Tennessee. We think the facts so neglected had a material bearing and should have been considered. They showed that what otherwise seemed an intrastate transaction was a part of interstate commerce . . . .
>
> For these reasons, we are of opinion that the transaction was a part of interstate commerce in which the plaintiff could lawfully engage without permission of the State of Kentucky and that the Statute in question which concededly imposed burdensome conditions, was, as to that transaction, invalid because repugnant to the commerce clause."[13]

It is contended that the Mississippi Supreme Court is guilty of the same erroneous reasoning which misled the Kentucky court in *Dahnke-Walker* in stating that:

> The fact that afterward Allenberg might or might not sell the cotton in interstate commerce is irrelevant to the issue here, as the Mississippi transaction had been completed and the cotton then belonged exclusively to Allenberg, to be disposed of as it saw fit, at its sole election and discretion.[14]

---

13 Dahnke-Walker, Supra at P. 292.

14 Allenberg Cotton Company v. Pittman, 276 So. 2d 678.

In the instant case, the sole motivation for Allenberg's purchase of cotton in Mississippi was to ship it in interstate commerce to the mills with whom it had contracted to deliver cotton. The Allenberg contracts called for the farmer to deliver the cotton to a warehouse where it was compressed for transshipment to mills in other States. The proposed delivery of cotton to the warehouse in the case at bar is analogous to delivery of wheat in *Dahnke-Walker* to the common carrier; the warehouse was not to be the final resting point for Mr. Pittman's cotton. The transaction was not thereby stripped of its otherwise interstate character.

Shafer v. Farmers Grain Co., 268 U.S. 189, 69 L. Ed. 909, is a case involving a similar question. In that case, North Dakota had passed a statute which undertook to regulate the marketing of wheat within the State through licensing, bonding and general supervision of those buying wheat within the State. The plaintiffs operated grain elevators within North Dakota at which they bought wheat for shipment to markets in other States. Plaintiffs' grain elevators served as facilities both for receiving grain from the wagons of the farmers and for subsequent loading of the wheat onto railroad cars after accumulation of carload lots. Plaintiffs challenged the constitutionality of the Act. The United States Supreme Court agreed with plaintiffs' contention, holding the Act a direct interference with and burden upon interstate commerce.

> Buying for shipment, and shipping, to markets in other states, when conducted as before shown, constitutes interstate commerce,—the buying being as much a part of it as the shipping.[15]

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15 Shafer v. Farmers Grain Company, supra, citing Lemke v. Farmers Grain Company, 258 U.S. 50, 66 L. Ed. 458.

It is submitted that the nature of the purchase transactions held to be interstate commerce in *Shafer* are indistinguishable from the nature of the purchases in the case at bar. In *Shafer*, wheat was bought and then loaded into grain elevators to await subsequent shipment by railroad car outside the State. In the instant case, the contract called for the cotton to be delivered to a warehouse to await subsequent shipment outside the State. It is manifest that the decision of the Supreme Court of Mississippi is inconsistent with *Shafer*.

Another decision in which a similar question was before the United States Supreme Court was *Lilly & Co. v. Sav-On-Drugs*, 366 U.S. 276, 6 L. Ed. 2d 288. This case involved a foreign corporation conducting both interstate and intrastate activity in New Jersey. Lilly & Company sold its products to wholesalers in New Jersey. It maintained a local office in New Jersey, in which it employed a full time secretary and a staff of 18 detailmen, whose job was to visit New Jersey pharmacists, physicians, and hospitals in order to acquaint them with Lilly products with the hopeful result of increasing the volume of business handled by Lilly's customers, the New Jersey wholesalers. The detailmen also assisted retailers in advertising and promoting Lilly & Co. products.

The United States Supreme Court held that the above activity amounted to a "domestic business—inducing one local merchant to buy a particular class of goods from another." The Court went on to state that:

> Here, Lilly is suing upon a contract *entirely separable* from any particular interstate sale and the power of the State is consequently not limited by cases involving such contracts. [Emphasis added.][16]

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16 **Lilly and Company v. Sav-On-Drugs**, 366 U.S. 276 at 282-283.

The facts in Allenberg are those of *Shafer*, not those of *Lilly*. Allenberg maintained no local office in Mississippi; it had no sales force; its only contact was a local Mississippi buyer who worked on a commission basis for soliciting sales of cotton. The entire offer-acceptance procedure of establishing a contract for the sale and purchase of cotton to be grown in Mississippi was handled through interstate mails and telephone conversations. The local Mississippi buyer solicited offers from farmers in the area. He conveyed such offers to Allenberg in Memphis by interstate telephone conversations. Allenberg either accepted or rejected such offers in Memphis. If they accepted, they prepared and signed a contract and forwarded it to the Mississippi buyer who saw to it that the farmer executed this contract. The actual contract for the sale and purchase of cotton came into existence in Memphis if Allenberg accepted the offer conveyed. The signing of the written contract was only evidence of the oral contract[17] which had been negotiated in interstate commerce. However, the question is not whether the contract was made in Mississippi, but whether the business conducted thereby was interstate in nature. Certainly it was. The entire motivation for purchasing Mr. Pittman's cotton was to deliver the same cotton to textile mills outside the State to meet Allenberg's previous commitments.

In *Shafer*, it was estimated that 90 per cent of the wheat bought by plaintiffs was shipped into interstate commerce; in the instant case, as pointed out in Appellants' Brief, 100 per cent of the cotton purchased by Allenberg in Mississippi during the 1971 crop year was shipped outside the

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17 17 C.J.S. §49 p. 701, citing: **Dohrman v. Sullivan**, 220 S.W. 2d 973; **Murphy v. Chichetto**, 79 N.E. 2d 898; **Rosenfield v. U.S. Trust**, 195 N.E. 323.

State. In fact, there are no textile mills of any significant size located in the State of Mississippi.[18]

CONCLUSION

The Mississippi Supreme Court decision conflicts with the traditional interpretation of interstate commerce, and its effect is to impair the free flow of cotton in interstate commerce. That Court considered only the contract and, finding the contract performable solely in Mississippi, characterized the transaction as intrastate. So, too, in *Dahnke-Walker* and *Shafer*, were the contracts performable. But this is a very narrow view of the events involved in this transaction.

Certainly a State reserves the right to govern intrastate business and may burden foreign corporations with taxes, restrictions and even the punitive measure of impairment of contract. But, this restrictive claim of authority should be limited and construed most strictly against the State imposing such burdens. The cotton industry, like many other industries engaged in the interstate sale of goods, needs the protection of the Federal system and the traditional broad construction of the interstate commerce exclusion. For this reason, the instant case has a significance far beyond the parties involved and needs a judicial clarification of the boundaries of interstate commerce in favor of the free flow of goods.

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[18] USDA Supplement No. 4, 1972, to Bulletin No. 417, **Statistics on Cotton and Related Data, 1930-1967**, pp. 58 and 77.

For the above-stated reasons, as well as those developed by appellant, the decision of the Supreme Court of the State of Mississippi should be reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 70-69

ALLENBERG COTTON COMPANY, INC.,
Appellant,

v.

BEN E. PITTMAN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF OF APPELLANT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-628

ALLENBERG COTTON COMPANY, INC.,
Appellant,

v.

BEN E. PITTMAN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF FOR APPELLANT

QUESTIONS PRESENTED

I. WHETHER THE SUPREME COURT HAS JURISDICTION OVER A FEDERAL QUESTION:

A. WHERE THE STATE SUPREME COURT HAS CERTIFIED THAT IT NECESSARILY DECIDED THE FEDERAL QUESTION;

B. WHERE A STATE STATUTE INCORPORATES THE CONSTITUTIONAL EXEMPTION, AND THE QUESTION OF APPLICATION OF THE EXEMPTION WAS DECIDED BY THE STATE SUPREME COURT;

C. WHERE A CHALLENGE TO STATE INTERFERENCE WITH CONSTITUTIONAL RIGHTS IS ASSERTED IN A PETITION FOR REHEARING, AND SUCH PETITION PRESENTED THE FIRST OPPORTUNITY FOR THAT CHALLENGE AFTER ACTUAL INTERFERENCE WITH SUCH RIGHTS.

II. WHETHER MISSISSIPPI'S REFUSAL TO ALLOW A FOREIGN CORPORATION TO ENFORCE ITS CONTRACT WITH A MISSISSIPPI RESIDENT FOR THE PURCHASE OF COTTON TO BE SHIPPED FROM THE STATE IS REPUGNANT TO THE COMMERCE CLAUSE.

STATUTES CONSIDERED

Mississippi Code 1942 Annotated §5309-239 (Supp. 1972):

§5309-239. ***Transacting business without certificate of authority.***

No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state. Nor shall any action, suit or proceeding be maintained in any court of this state by any successor or assignee of such corporation on any right, claim or demand arising out of the transaction of business by such corporation in this state.

The failure of a foreign corporation to obtain a certificate of authority to transact business in this state shall not impair the validity of any contract or act of such

corporation, and shall not prevent such corporation from defending any action, suit or proceeding in any court of this state.

A foreign corporation which transacts business in this state without a certificate of authority shall be liable to this state, for the years or parts thereof during which it transacted business in this state without a certificate of authority, in an amount equal to all fees which would have been imposed by this Act upon such corporation had it duly applied for and received a certificate of authority to transact business in this state as required by this Act and thereafter filed all reports required by this Act, plus all penalties imposed by this Act for failure to pay such fees. The Attorney General shall bring proceedings to recover all amounts due this state under the provisions of this section.

Mississippi Code 1942 Annotated §5309-221 (Supp. 1972):

§5309-221. ***Admission of foreign corporation.***

No foreign business corporation for profit shall have the right to transact business in this state until it shall have procured a certificate of authority so to do from the Secretary of State. No foreign corporation shall be entitled to procure a certificate of authority under this Act to transact in this state any business which a corporation organized under this Act is not permitted to transact. A foreign business corporation for profit shall not be denied a certificate of authority by reason of the fact that the laws of the state or country under which such corporation is organized governing its organization and internal affairs differ from the laws of this state, and nothing in this Act contained shall be construed to authorize this state to regulate the organization or the internal affairs of such corporation. No foreign

non-profit non-share or non-profit or non-share corporation shall be entitled to procure a certificate of authority under this Act.

Without excluding other activities which may not constitute transacting business in this state, a foreign corporation shall not be considered to be transacting business in this state, for the purposes of this Act, by reason of carrying on in this state any one or more of the following activities:

(a) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes.

(b) Maintaining bank accounts.

(c) Maintaining offices or agencies for the transfer, exchange and registration of its securities, or appointing and maintaining trustees or depositaries with relation to its securities.

(d) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance without this state before becoming binding contracts.

(e) Transacting any business in interstate commerce.

(f) Conducting an isolated transaction completed within a period of thirty (30) days and not in the course of a number of repeated transactions of like nature.

(g) Investing in or acquiring, in transactions outside of Mississippi, royalties and other non-operating mineral interests, and the execution of division orders, contracts of sale and other instruments incidental to the ownership of such non-operating mineral interests.

Mississippi Code 1942 Annotated §5309-312 (Supp. 1972):

§5309-312. ***Application to foreign and interstate commerce.***

The provisions of this Act shall apply to commerce with foreign nations and among the several states only in so far as the same may be permitted under the provisions of the Constitution of the United States.

STATEMENT OF THE CASE

A. The Contract Between the Parties

Prior to the cotton crop year 1971, Appellant, Allenberg Cotton Company, Inc., a Tennessee corporation, based in Memphis, Tennessee, arranged with one Covington, an independent cotton broker[1] located in Marks, Mississippi, to solicit offers for the sale of cotton from cotton farmers in the area around Marks (A.49, 66). Covington had 30 years' experience as a broker and as a buyer and seller of cotton (A.60). Covington had performed this service for other cotton merchants[2] and mills in past years, and he performed this service for other merchants and mills in 1972. In 1971 Covington, for reasons of his own, performed brokerage service only for Allenberg, although he was not restricted to Allenberg by any agreement (A.50, 52, 69). Covington was a part-time broker; he also bought and sold cotton for his own account (A.60). Under his arrangement with Allenberg, Covington would discuss with a local farmer the number of acres of cotton the farmer

[1] As used herein a cotton "broker" is a middleman who arranges a sale between the parties for a commission without taking title to the cotton.

[2] As used herein a "merchant" is one who buys and sells cotton for a profit.

might be willing to sell, the price at which he would be willing to sell, and the gin to be used (A.54, 55). After receiving an offer, Covington would telephone the Allenberg office in Memphis, Tennessee, and tender the farmer's offer to sell (A.54). Covington had no authority to enter into a crop purchase contract (A.60-61, 65, 66). Covington received a commission of from 50¢ to $1.25 per bale for his brokerage services (A.53). Sometimes this was paid by the farmer and sometimes by Allenberg (A.53). If the Allenberg office in Memphis accepted the farmer's offer to sell a bargain was struck at that time (A.103). Then the terms would be reduced to writing in a contract prepared and signed in Memphis by Allenberg, which was mailed to Covington, who would then have the farmer sign the contract (A.62, 63, 73). Allenberg also purchased cotton throughout the Cotton Belt, including Mississippi, Arkansas, Missouri, Tennessee, Louisiana, California, Arizona and Texas (R.70-78). Allenberg sold and shipped cotton throughout the world to its mill customers, most of which were located in Alabama, Georgia, North and South Carolina, Europe and Asia (A.93).

The contract between Appellant-Allenberg and Appellee-Pittman which is the subject matter of this suit, was established in the normal manner, which is described above, except that instead of being mailed to Covington (the broker), it, and several others, were delivered by hand by an employee of Allenberg who drove from Allenberg's Memphis office to Covington's office in Marks, Mississippi (A.57). Pittman was aware that he was contracting with Allenberg Cotton Company, Inc. of Memphis, Tennessee (A.82-83, A.5-6).

In January 1971 Ben E. Pittman approached Covington and asked if he could obtain a price of 22¢ per pound for his cotton (A.101-103). As a result of inquiries made to

Allenberg by Covington, an agreement was reached (A.103). The Pittman contract was executed January 28, 1971 (A.7, 8). At that time no cotton had been planted by Pittman. The contract required Pittman to have his cotton stored in a cotton compress and warehouse after it was harvested and ginned (A.7, 8). Samples of the bales of cotton were to be sent by Pittman to the U. S. Department of Agriculture for classification, and to Allenberg at its office in Memphis (A.7, 8). To obtain payment for the cotton Pittman was to deliver the U.S.D.A. classification cards and the warehouse receipts to Allenberg or Covington (A.7, 8). Pittman paid for compressing the cotton, and for storage fees until he delivered the warehouse receipts (A.7, A.68). Memphis Cotton Exchange Rules governed the contract (A.7, 8).

The cotton bought by Allenberg in Mississippi, including Pittman's cotton, was all purchased for shipment outside Mississippi (A.60, 78, 79, 96). In 1971 much of the cotton from the farming area around Marks, Mississippi, (where Pittman's farm was located) was shipped to Japan (A.60). The Pittman cotton was to be temporarily stored at a Mississippi warehouse designated in the contract pending its shipment to a customer of Allenberg outside of Mississippi (R.60, 78, 93, 96). *All* of the cotton purchased by Allenberg in Mississippi was shipped by interstate carrier outside the state of Mississippi[3] (A.106). At the time of the Pittman purchase, Allenberg was already obligated to customers outside the state of Mississippi to sell them cotton (A.93). The Pittman cotton was purchased for the purpose of satisfying part

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[3] Virtually all of the 1,693,000 bales of cotton grown in Mississippi in 1971 were shipped out of the state because there is no significant amount of cotton used by mills in Mississippi. U.S. Department of Agriculture, **Supp. for 1972 to Bulletin No. 417-Statistics on Cotton and Related Data 1930-1967**, pp. 58 and 77.

of this obligation (A.79). Pittman knew with whom he was contracting (A.5, A.83), and never denied knowing that the cotton would be shipped from the state (A.82-86).

The Pittman contract was entered in January, 1971, but by the time for delivery of the cotton to Allenberg in November, 1971, the market price of the cotton was $18,156.00 more than the contract price, and Pittman refused to deliver the cotton to Allenberg (A.118).

Allenberg sued in the Chancery Court of Quitman County, Mississippi, to enforce its rights under the contract. The Chancery Court found a breach of contract by Pittman and awarded damages to Allenberg of $18,156.00 and costs (A.132). On direct appeal to the Supreme Court of Mississippi, that court reversed and dismissed the case, holding that Allenberg was a foreign corporation transacting business within Mississippi without a certificate of authority, and that Miss. Code 1942 Ann. Sect. 5309-239 (Supp. 1972) barred Allenberg from maintaining suit in the courts of Mississippi.

B. Industry Context

The industry context of this case is explained in the following materials, which are included to show the economic functions performed by a cotton merchant such as Allenberg in participating in and creating markets for cotton in the United States and elsewhere in the world, as well as to explain the effect of certain federal programs on the marketing of cotton in the United States.

One of the primary functions of the cotton merchant is to assemble from all parts of the United States Cotton Belt and elsewhere in the world quantities of like kind, called "even-running cotton":

"Each of the thousands of mills [consuming or fabricating] cotton throughout the world specializes by necessity in a narrow range of products, and each requires specific qualities of 'even-running' cotton for efficient operation.

"Raw cotton is produced on millions of farms; and on most of these farms ***each bale is of a different quality*** due to variations in soil, time of planting, harvesting, changes in weather, variety of cotton planted, and many other causes. A vital function then of cotton merchandisers is to assemble these odd-lot bales and pool them with other bales of like qualities to make up "even-running" lots to meet the requirements of spinners wherever they are. Strange as it may seem, three or four bales grown by any one farmer may need to be, and sometimes are, actually sent to different parts of the world in order that each bale may find its best market and most efficient use. It is thus quite possible that a bale of cotton grown near a cotton mill in Texas will find its most economical use in a mill deep in France, or even a mill on the banks of the Ganges River in India alongside another cotton field; and a bale grown in India, because of its wooly nature, may be sent to the United States to be mixed with wool in making blankets and rugs."[4]

"Every cotton spinning mill is equipped to [operate on] a specific quality of cotton . . . A mill equipped to balance on Strict Middling cotton would not clean Strict Low Middling fast enough to keep the second set of equipment busy. Moreover, rolls set to draw 7/8 inch cotton could not handle 1-1/16 inch without substantial

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[4] A.B. Cox, **Cotton-Demand, Supply & Merchandising** (Hemphill, Austin, Texas 1953), pp. 4-5 (emphasis added). A.B. Cox was professor of cotton marketing at the University of Texas at the time this text was written and had been since 1926.

adjustments. These facts alone justify the spinning mill's insistence on delivery of the exact quality of cotton it buys."[5]

"Reasons for mill insistence on uniformity of staple length in cotton are made manifest at this point in the manufacturing process. If some of the cotton is long staple and some short and the mill operator sets his rolls to clear the long fibers, the short ones are not drawn and tend to fall down between the rolls and cause much waste. If the rolls are spaced for the short fibers, the long ones are caught by two pairs of rollers and are stretched or broken; the result is ragged, buckled yarn. In no case is it possible to make smooth yarn economically with such staple mixtures."[6]

Because of the needs of the textile industry as described above, cotton bought in various places of the world is grouped together by merchants, such as Allenberg, into even-running lots for delivery to the mills that are its customers. This grouping is done by the merchant's experts based on the government classification of the cotton, and based on the samples delivered to a merchant's home office.

"The commodity traded in spinners' markets is not just cotton. It is *even-running when qualities that are measurable are alike in each bale*: the grade is the same, the staple length is the same and the color is the same."[7]

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[5] A. B. Cox, supra, n.4, p. 49.

[6] A. B. Cox, supra, n.4, pp. 50-51.

[7] A. B. Cox, supra, n.4, p. 168 (emphasis added).

While the cotton is being classed and assembled into even-running lots on the basis of the samples, the bale itself remains in the warehouse to which it was delivered by the farmer because it is unnecessary and uneconomical to ship the actual bale to a point like Memphis:

"Cotton concentration is a major service performed in cotton marketing. Farmers start the job of assembling cotton when they haul it to the gins and local markets to be made into bales and sold. It is bought and handled in farmer's markets in what is known as "Odd Lots", in units most often of one to a few bales at a time. Farmers aid in concentration but what they do is not a part of concentration as the term is used in cotton marketing. Concentration means specifically the assembling of "Odd Lot" cotton into even-running lots in warehouses selected by cotton merchants for the purpose. These warehouses are located in towns and cities best situated to serve important areas of cotton production, or strategically located with reference to the market for the cotton of the area. These cities, properly equipped with transportation and communication facilities and with warehouse space and compresses, have come to be known as cotton concentration points.

"*The managerial work of cotton concentration takes place in the merchant's office*. The classing department determines the class of each bale bought. Cards are made out for each bale showing in detail the qualities of each bale, its mark, origin, weight, location, price, etc. The cards then become the means of making up even-running qualities and of picking out bales to ship. The facts for cotton concentration for cotton marketing operations are on these records in the merchant's office. *Even-running lots to ship to a mill are thus made up in the merchant's office* and not by warehousemen.

"The actual picking out of the bales of cotton, tagging and marketing them for shipment, loading the bales into cars and taking out the bill of lading are functions performed by warehousemen at the direction of the cotton merchant."[8]

Because the price of cotton is subject to great fluctuations, those who handle the commodity in quantity must protect themselves from rapid price changes by either assuring an actual market for the cotton held by them, or by use of the futures exchange. For the Pittman cotton, Allenberg had already assured a market by advance sales to mills outside the State of Mississippi, at the time Allenberg contracted to buy the cotton in Mississippi.[9]

Where the merchant does not already have a customer to buy the cotton, cotton bought by the merchant is, by normal industry practice, hedged by offsetting sales of futures on the New York Cotton Exchange.[10] The economic function of the futures market is well known and needs no lengthy explanation here.[11]

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[8] A. B. Cox, supra, n. 4, pp. 233-234 (emphasis added).

[9] For an explanation of this practice see first example, infra, n. 11.

[10] This practice is described in several textbooks, see A. B. Cox, supra, n. 4, p. 259 et seq.; A. H. Garside, **Cotton Goes to Market** (Frederick Stokes Co., New York, 1935) p. 206 et seq.; T. S. Miller, **The American Cotton System** (Austin, Tex. 1909), p. 102 et seq.

[11] "It is the function of the commodity futures market to eliminate or reduce the risk of price fluctuations in the process by which a commodity moves from grower to consumer. The method whereby this is accomplished, using the cotton business as an example, is as follows: Contracts on the exchange call for the purchase or sale of cotton for future delivery during a specified month from one to eighteen months from the date the contract is made. A person engaged in the production, manufacture or sale of cotton may take a position on the exchange by buying or selling cotton for future delivery to offset his purchase or commitments in the actual

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It is sufficient to point out that any merchant which contracts to buy cotton from a farmer should either assure itself of a market by resale of the actual cotton to a mill, or should make offsetting sales (hedges) on the cotton exchange.[12] In either case there is immediate and direct reliance on the validity and enforceability of the cotton purchase contract entered into between the merchant and the farmer. If the contract with the farmer cannot be enforced, the merchant is no longer hedging within the

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commodity and thus hedge (insure) against price fluctuations. This can be illustrated by the example of a merchant who sells spot cotton for delivery to a mill six months from now at a fixed price which gives him a fixed profit based upon current spot prices. He does not now have the cotton and therefore takes the risk of a change in the spot price when he is to acquire it to fulfill his commitment to deliver. To guard against the risk of a change in price, he takes a long position on the futures market of an equivalent amount of cotton (i.e., he makes a contract to purchase cotton for future delivery on the exchange). If the price of spot cotton increases during the six-month period, the price of futures will tend to increase correspondingly and the loss he sustains in having to pay a higher price for spot cotton will be offset by the gain in price on the futures market when he closes out his futures contract at a profit. In another case, the merchant purchases cotton for inventory from a farmer at a fixed price. To avoid the risk of a change in price when he is ready to sell it, he takes a short position on the futures market (i.e., he makes a contract to sell cotton for future delivery on the exchange). If the price of spot cotton decreases the price of futures will tend to decrease correspondingly and the loss he sustains in the value of his inventory will be offset by his gain on the futures market when he closes out his futures contract at a profit . . . The futures exchange is used by those who grow, manufacture, process, sell and utilize cotton and cotton products and wish to hedge against price fluctuations." **Volkart Brothers, Inc. v. Freeman**, 311 F.2d 52 (5th Cir. 1962) pp. 54-55.

[12] The New York Cotton Exchange is a designated contract market under the Commodity Exchange Act. Act of September 21, 1922, c. 369, 42 Stat. 998, as amended by Act of June 15, 1936, c. 545, 49 Stat. 1941, as amended, 7 U.S.C. Sec. 1 et seq. It is now the only active cotton futures market in the United States.

meaning of the Commodity Exchange Act, but becomes an unintended speculator [13] subject to enormous loss if the price of cotton goes higher, because the merchant must replace the cotton it has sold to its customer or sold on the cotton exchange, by buying replacement cotton at the higher market price. If these losses exceed the merchant's capital, defaults will result in the contracts on the futures exchange or on spot cotton sales to the mills.[14] The integrity of the merchant's contract with the initial source of supply, the farmer, is thus the foundation of the entire commodity merchandising system.

"The cotton market is a complex of interrelated, economic forces and institutional facilities which in operation serves to equate the demand for and the supply of cotton in terms of prices. Thus the full concept of the term, 'the cotton market', comprehends all of the specialized, interrelated, physical facilities, economic forces, trade organizations and trading techniques which are involved in the merchandising of cotton. Trade units such as the New Orleans Cotton Exchange or the cotton exchanges in

[13] "Bona fide hedging transactions shall mean sales of any commodity for future delivery on or subject to the rules of any board of trade to the **extent that such sales are offset in quantity by the ownership and purchase of the same cash commodity** or conversely, purchases of any commodity for future delivery on or subject to the rules of any board of trade to the extent that such purchases are offset by sales of the same cash commodity." (Emphasis added), Commodity Exchange Act, supra, n. 9, Sect. 6a(3). The Commodity Exchange Authority has established limits on the size of a **speculative** position which can be taken on the New York Cotton Exchange by a trader. 17 C.F.R. Sect. 150.2 (currently 30,000 bales). But the size of a trader's position on the exchange which is created by bona fide **hedging** is not limited. 17 C.F.R. Sect. 150.2 (c). Thus, if a cotton merchant has made contracts with farmers and has hedged them on the New York Cotton Exchange, and then the contracts are discovered to be unenforceable, the merchant not only faces financial ruin, but also may be subject to civil and criminal penalties for violation of the Commodity Exchange Act, 7 U.S.C. Sect. 1 et seq., if the size of his position exceeds the speculative limits.

[14] Bank financing of the cotton merchant may allow the merchant to
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such cities as Memphis, Tenn., Osaka, Japan, Alexandria, Egypt, and Bremen, Germany, are not self-contained markets but owe their importance to the parts they play in an overall cotton marketing system.

"The area of the cotton market is the extent of territory over which these economic forces and institutional facilities operate effectvely enough to establish competitive price relations. The area of the market for cotton is world-wide, though the facilities for effecting the bulk of the transactions are located in a comparatively few well-known exchanges with world-wide memberships and wire connections. Cotton is used in all parts of the world and has many uses. There are many varieties and qualities of cotton produced in the world and they have a wide range of best uses. Nevertheless, overlapping uses are broad enough and important enough, and costs of communication and transportation are low enough, to make the different growths of cotton of the world (such as American, Indian and Egyptian) highly competitive in the great consumer markets of the world. This competition of various growths of cotton for world markets *establishes a definite price relationship among them and, therefore, a world price and a world market for all cotton* as well as for each major growth (such as American)." [15]

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borrow up to 90% of the price of the raw cotton, because the bank, too, relies on the sale of futures against the purchase of cotton from the farmers to protect the merchant from market risks due to price fluctuations. This allows the cotton merchant to handle a large quantity of cotton on a relatively small amount of capital. A. B. Cox, supra, n. 4, p. 181.

[15] A. B. Cox, supra, n. 4, pp. 1, 2 (emphasis added). See also Dummerier & Heflebower, **Economics with Application to Agriculture**, (McGraw-Hill, 1934) p. 171: "The market for wheat and cotton has in years past been essentially world-wide because of the following facts. Cotton is used by all classes of people in practically all parts of the world except
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"The cotton market is a world market and cotton merchandising is of necessity a world-wide business. Over fifty countries manufacture cotton and most of the cotton spindles (mills) of the world are in countries and areas which produce little or no cotton . . . Thus in a large measure, the factors and forces which locate cotton manufacturing are different from those which locate cotton production. Cotton production is oriented on the globe primarily by climate and soil conditions.

"Cotton textile mills of the world constitute the battleground where United States grown cotton, along with other growths of cotton, will win or lose the fight for markets.

"In this struggle for markets the cotton merchandiser is now, and in the years ahead must be, the closest ally and advisor of the cotton manufacturer . . . Cotton merchants are in the best position to know or find out the availability of various qualities of cotton and their costs. They are, therefore, in a position to help the spinner make blends to get the maximum values out of the cotton he buys.

"Cotton growers constitute another major group to be served by the cotton market. They are essential to the cotton industry for they produce the raw material upon which the cotton industry is built.

"The raw cotton merchandising system is a service institution. Cotton growers are producing cotton as a

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in the very cold regions. Wheat is an important part of the diet in most nations. Both are among the most non-perishable of agricultural products. Cotton at the prices which have normally prevailed in the past and wheat at similar prices are not extremely bulky in relation to value, particularly when it is realized that much of the transportation is by ships over large bodies of water. Baled cotton is easily handled and does not suffer from ocean transportation, and wheat can be handled in bulk cheaply. The latter withstands ocean shipment better than most grains."

raw material to be sold to mills to accomplish specific, predictable results. Whether cotton does what is expected of it depends on the qualities of the cotton and the accuracy with which it is classed. The qualities of cotton coming into the market are determined in the long run by the premiums and discounts received by growers for the cotton they sell, for these become the major factors determining the kinds of seed planted, cultural practics, and manner of harvesting and ginning. Use values and competition force manufacturers to pay premiums for the better qualities of cotton such as longer staples, higher grades, and finer, stronger fibers or superior working qualities, especially in "even-running" lots, and likewise to pay discounts for cotton which has the opposite characteristics. *It is the responsibility of the cotton marketing system to pay proper premiums and discounts to the cotton growers as incentives to grow the cotton required by the market.*

"*The biggest, most important service the cotton marketing system can render cotton growers is to make prices paid to farmers in local communities and regions true guides in direction of production.* This means that the varieties of cotton best suited to a region will and should sell at relatively the highest price and other cottons, whether longer or shorter in staple, will sell at relatively lower prices. The farmer who grows an inch and a quarter staple cotton on land and in a region devoted and best adapted to producing 15/16 inch cotton renders a disservice, because the cotton so grown is difficult to merchandise and is of doubtful value as there is not enough of it to make "even-running" lots of one hundred bales.

"Cotton growers harvest their cotton over a three or four months' period. They pay relatively high rates of interest, and they need to sell all of their production at the time of harvest. It is a function of the cotton market

to absorb and carry this supply until needed and without undue depression of the price at time of harvest.

"Some cotton growers, and the number is destined to increase as mechanization increases, ***wish to sell portions of their anticipated production before they plant their cotton in order to secure a hedge against their outlays for production***. The market must furnish this service.

"The cotton marketing system is likewise expected to give ***protection to those who furnish the funds to finance stocks of cotton***. It is also expected to furnish the means and ***conditions for competitive trading which are adequate to maintain prices of cotton at levels most nearly equal to the world's best judgment of its value***."[16]

As for foregoing material shows, the market for cotton is worldwide because, although there are many varieties and qualities of cotton, the costs of communication and transportation are sufficiently low to make competition between various growths and this establishes definite price relationships among those growths, creating world prices and a world market.

Cotton merchants such as Allenberg establish the vital link between the consuming mills and the producing farms. Competition between merchants causes the farmer to be paid proper premiums and discounts for whatever variety of cotton he produces.

The American Cotton Shippers Association is the trade association that represents approximately 492 United States cotton merchants. These 492 merchants handle over 70% of the raw cotton sold to domestic textile mills, and over 80% of the U. S. Cotton crop sold in foreign markets.[17]

[16] A. B. Cox, supra n. 4, pp. 5-10 (emphasis added).

[17] **Brief for the American Cotton Shippers Association as Amicus Curiae**, p. 3, citing Hearings Before the Subcommittee on Domestic Marketing and Consumer Relations of the Committee on Agriculture, 92nd Cong., 2nd Sess. (Statement of Neal P. Gillen in connection with H.R. 14987 on Aug. 16, 1972).

These 492 merchants are economically able to buy and sell enormous quantities of cotton on relatively small amounts of capital:

"Cotton merchants put the bulk of the supply of cotton on the futures markets through the sale of futures contracts against unsold spot [i.e. 'cash' or 'actual' cotton, as distinguished from 'futures'] cotton *** They take their warehouse receipts and their contracts showing sale of futures against the spot cotton, which together make prime collateral, to banks, and ***borrow up to 90 per cent of the price of the raw cotton***. In this way banks are enabled to furnish the bulk of the money to finance cotton stocks with very little risks on their part **** It is important to understand that, while banks furnish the bulk of the money to finance the carrying of cotton, ***they are enabled to do it because the organization of the cotton merchandising system enables the cotton trade to eliminate most of the risks in cotton by offset*** ..."[18]

If contracts for the purchase of spot cotton between farmers and merchants cannot be enforced by merchants, or are rendered questionable, the offset or hedging of the cotton against unfavorable price changes could not be accomplished. If hedging was not possible, credit sources for the industry would not be available. If credit was not available, then only merchants with enormous capital could afford to purchase cotton, and those buyers would have to insure an enormous spread between the price paid the farmer and the resale price in order to cover possible price variations. This would result in fewer merchants competing to purchase the farmers' cotton, and lower prices for the farmer.

[18] A. B. Cox, supra n. 4, p. 181 (emphasis added).

The fundamentals of cotton merchandising cited above are essentially the same whether the merchant contracts to buy the farmer's cotton before or after it is produced. If the merchant contracts before the crop is produced, he must be even more certain that his position is balanced because he must maintain it over a longer period of time and incur greater price risks.

Traditionally, the cotton crop produced in the United States has been sold in the fall after harvesting. Without government intervention, this practice of selling in the fall would leave the farmer in the precarious circumstances of having to invest a year's labor and materials in his crop without knowing whether he would be able to sell the crop at a price adequate to recoup his investment.

Government loan and subsidy programs have, in some measure, enabled farmers to reduce the risk of a poor sales price. A number of different programs have been used since the New Deal, but "a program of purchases and non-recourse commodity loans has been the basic foundation of United States farm price and income policy since the mid-1930's. While these programs do not alter the underlying consumer demand for farm products, they have operated in such a way as to provide an outlet for that portion of farm output that would otherwise have cleared the market only at much lower prices."[19]

Under the loan and storage program a farmer, using his expected crop as security, received a non-recourse loan from the Commodity Credit Corporation (CCC). If he was unable to market his cotton for more than the amount of the loan, he could deliver it to the CCC in satisfaction of

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[19] D. E. Hathaway, **Government and Agriculture**, (MacMillan Company, N. Y. 1963) p. 260.

the loan. This policy produced huge cotton surpluses stored in CCC warehouses.[20]

In order to reduce the surpluses the federal government curtailed the planting of cotton on more than a certain allotted acreage. Such a program was in effect in the United States prior to 1970.[21]

However, by 1970 the surpluses were gone and a basic change was made in the cotton program of the United States.[22] Under the Act of November 30, 1970, P. L. 91-524, farmers were allowed to produce cotton on as many acres as they desired. However, the government price support was available only for the cotton produced on the farmer's acreage allotment. The cotton produced on other than allotted acreage was produced at the farmer's own risk. The first crop year to which this new program applied was 1971. Thus, in 1971, before planting, many U. S. cotton farmers began to look for a way to protect themselves against a price decline if they should decide to plant cotton for which there was no government price support. For this reason, 1971 was the first year of the widespread use of a new type of contractual arrangement, the "forward"[23] contract. In 1971 11% of the United States upland[24] cotton crop was "forward" contracted, i.e. was contracted to be

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[20] See "Need for Legislation", 1970 U. S. Code, Cong. & Adm. News, p. 6198, summarizing the need for P. L. 91-524, discussed in text, infra.

[21] U. S. C. Sect. 1444 as effective prior to the Act of November 30, 1970, P. L. 91-524.

[22] Op. cit. supra n. 20.

[23] As used herein the term "forward contract" means an executory contract made prior to harvest, as distinguished from the traditional sale of cotton after harvest, which normally was not executory but consisted of immediate delivery of warehouse receipts in exchange for payment.

[24] "Upland" cotton is also called "American cotton". The term means cotton grown in the Southeastern United States. Dictionary of the English

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sold in advance of harvest.[25]

One of the 1971 forward contracts was the contract between Appellant-Allenberg and Appellee-Pittman. That contract was signed in January, 1971 and applied to the production of cotton by Pittman during the 1971 crop year. Thus Pittman, and other farmers who also forward contracted, knew even before they planted that they had a market for their cotton—in effect a price support from a private source, the cotton merchant. (As stated above, by the fall of 1971 Pittman found that the market price for his cotton exceeded the contract price, and he refused to deliver to Allenberg.)

In 1972 the practice of forward contracting became more popular and 32% of the United States upland cotton crop was sold in advance of harvest.[26]

Farmers who made forward contracts in the early part of 1972, for example in February, 1972, received an average price per pound of 30.27 cents.[27] Those who waited until time of harvest to sell their cotton, for example in October, 1972, only received an average price of 25.56 cents per pound.[28] No doubt this experience had a great deal to do with the further increase in the use of forward contracting in 1973.

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Language (Random House, Unabridged 1966) p. 1570. Of a total 1973 U.S. crop of 12,740,000 bales only 112,000 bales is other than "upland". U.S. Department of Agriculture, **August 1973 Crop Report** (Aug. 9, 1973) p. 2.

[25] U. S. Dept. of Agriculture, **Cotton Situation**, (Oct. 1971) CS-253 p. 12.

[26] **August 1973 Crop Report**, supra n. 24, pp. 2 and 12.

[27] **Supp. for 1972 to Bulletin No. 417 - Statistics on Cotton & Related Data 1930-1967**, supra, n. 4, p. 85.

[28] Id. The 1972 price decline was directly contrary to the predictions of many respected "authorities". See, "Why Farmers are Bullish for 72", **The Farm Quarterly** (Feb. 1972) pp. 41-42.

Figures published by the U.S. Department of Agriculture in August 1973 showed "well over half of the 1973 crop was forward contracted . . . The percentage of acreage booked ranged from 28% in the Southwest to 72% in the [Mississippi] Delta."[29] Final figures by the U.S. Department of Agriculture indicate that about three-quarters of the nation's cotton crop was forward contracted in 1973.[30]

However, with the majority of the nation's cotton crop forward contracted in 1973, the economic picture suddenly changed. Contemporaneous with devaluation of the dollar came large crop failures abroad, and seven million bales of cotton were sold for export.[31] U.S. cotton farmers had planted fewer acres in 1973 in response to a cut in national base acreage allotment by the Department of Agriculture.[32] In the spring of 1973 the cotton crop was further reduced by extensive flooding in the Mississippi Delta.[33] All of these factors combined to create an unprecedented price rise which was described by the U.S. Department of Agriculture as follows: "Prices have skyrocketed in recent months as demand outpaced available supplies. These highest prices since the Civil War raise concern that some cotton producers may be reluctant to deliver cotton at lower prices contracted earlier."[34]

The State of Mississippi is located in the Delta area in which 72% of the cotton crop was forward contracted. On April 16, 1973, just as the wild boom in cotton prices was

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[29] Op. cit. supra, n. 26.

[30] U.S. Department of Agriculture, **Cotton Situation**, CS-253 (April 1974) p. 6.

[31] U.S. Department of Agriculture, **Cotton Situation**, CS-253 (Nov. 1973) p. 9; U.S. Department of Agriculture, **Cotton Situation**, CS-253 (April 1974) p. 5.

[32] U.S. Department of Agriculture, **Cotton Situation**, CS-253 (Aug. 1973) p. 3.

[33] Id.

[34] **Cotton Situation** (Nov. 1973), supra n. 31, p. 5.

getting started, the Supreme Court of Mississippi rendered the opinion in the instant case holding that no foreign cotton merchant or mill with a forward contract for purchase of cotton in Mississippi, could enforce that contract unless it had qualified to do business in Mississippi prior to the signing of the contract.

There are about 1.6 million bales of cotton produced in Mississippi in a normal crop year.[35] Seventy-two percent of this number would mean that there were approximately 1,152,000 bales under forward contract. Between the spring of 1973 and the peak price levels in the fall and winter of 1973 the price of cotton rose about $250.00 per bale.[36] Thus, the total market difference created by the price rise in the 72% of the Mississippi cotton crop which was forward contracted was 288 million dollars.

Faced not only with an unprecedented economic incentive to breach their contracts, but also supported by the decision of the Mississippi Supreme Court in this case, Mississippi farmers repudiated these 1973 forward contracts by the score.[37] There were also repudiations of forward contracts in Arkansas and Alabama, two cotton states in which the state statutes are similar to Mississippi's in prohibiting

[35] **Supp. for 1972 to Bulletin No. 417 - Statistics on Cotton & Related Data 1930-1967**, supra n. 3, p. 58, Table 61.

[36] Each bale of cotton weighs approximately 500 pounds. The price rise began at a level in the low 30 cents per pound range, and ended over 90 cents per pound; 50 cents per pound is $250 per bale. Compare, for example, the price of middling 1-1/16" cotton in the Memphis market in January, 1973, of 31.50 cents per pound, with its price in September, 1973, of 86.40 cents per pound. **Memphis Commercial Appeal**, February 1, 1973, p. 55 and September 21, 1973, p. 28.

[37] **Allenberg Cotton Co., Inc. v. Coleman**, 369 F. Supp. 426, 428, (N.D. Miss. 1974). In that case involving 1973 contracts, the District Court took judicial notice of its own docket to "observe that literally scores of suits have been filed to either enforce or rescind advance or forward contracts for the sale and delivery of cotton fiber."

enforcement of contracts made without qualification and in barring remedial qualification, that is, qualification after the contract has been breached.[38]

In 1973 the Congress made another basic change in the cotton price support system. Under the new program federal intervention will only take place if the price of cotton falls below a target price of 38 cents per pound:

> "The recently enacted Agriculture & Consumer Protection Act of 1973[39] contains provisions applicable to upland cotton beginning with the 1974/75 marketing year . . . In announcing the upland cotton program for 1974 Secretary of Agriculture Butz stated: 'A principal feature of the upland cotton program is the target price concept embodied in the 1973 Act. If the average market price received by farmers during the 1974 calendar year is at or above the 38 cent target price, no payments will be made . . .' Prices are strong and ***opportunities to contract ahead appear to be increasing***; farmers should plan accordingly."[40]

Prior to the 1974 crop year, cotton farmers received two types of support from the federal government. They received a loan about midway through the crop year, which was a source of operating capital, as well as a guaranteed minimum market price; and, after sale of the crop they also received a direct subsidy payment for each pound of cotton grown on allotment acreage regardless of the price at which the farmer sold his crop.

[38] e.g. **J. E. Crump v. Cone Mills Corporation**, U.S.D.C., E.D. Ark., No. PB-73-C-209; and **Reigal Fiber Corp. v. Ellis Brothers**, et al., U.S.D.C. N.D. Ala. No. 73P-954. In **Reigal** the defense interposed that the foreign corporation was not qualified (in this case a cotton mill) was overruled in a preliminary motion. A motion raising this defense in **Cone Mills** is still pending at this writing.

[39] P.L. 93-86. See 1973 U.S. Code Cong. and Adm. News 2498 et seq.

[40] **Cotton Situation (Nov. 1973)**, supra n. 31, p. 5 (emphasis added).

For example, in 1973, the U.S. Commodity Credit Corporation loan was 19.50 cents per pound.[41] Farmers were loaned an amount of money based on this figure and their average yields for the past three years on the allotted acreage only. They could repay the loan upon sale of the crop, or deliver the crop to the CCC in satisfaction of the loan. Since 1973 prices stayed above this price, the CCC purchase program was not used, i.e. farmers did not deliver their cotton to the CCC to satisfy the loan. Apart from the loan, cotton farmers received a direct subsidy payment of 15 cents per pound in 1973 (the same amount as in 1972 and 1971) for all cotton grown on allotted acreage.[42] Thus a farmer who had sold his allotment cotton in 1973 to a merchant for 30 cents per pound, received a total of 45 cents per pound for the crop. Farmers who sold at higher prices still received the 15 cents per pound subsidy payment.

In 1974, under P.L. 93-86, no farmer will receive any subsidy payment unless the average cotton price received drops below the target price of 38 cents per pound, and then the price support payment will only be paid for cotton grown on allotment acreage.[43]

Should the price of cotton stay above 38 cents in 1974, for the first time in many years the United States will pay no subsidy to its cotton farmers. And further, under the new program, it would be anticipated that farmers could obtain operating funds from private sources using forward

[41] **Cotton Situation (Nov. 1973)**, supra n. 31, p. 9. 19.50 cents was the loan per pound for the base quality: Middling 1-inch upland cotton. Other qualities and grades of cotton had different loan prices expressed in terms of points (each point is 1/100th cent) on or off this base price.

[42] Id.

[43] 7 U.S.C. Sec. 1444, as amended.

contracts as collateral. This will be necessary because the CCC loan is partial only, is based on a low price, and only on production on the allotment acreage. Additional capital will be necessary to finance larger plantings. As Secretary Butz' statement shows, it is hoped that farmers will be able to make forward contracts in 1974 to protect themselves[44] from adverse price changes by securing a favorable market for their cotton before planting; and to serve as collateral for obtaining operating funds.

Following the traumatic experiences of 1973, cotton merchants have been reluctant to enter forward contracts in 1974 at price differentials acceptable to the farmer. At this writing the most recent U.S. Department of Agriculture reports show forward contracting of the 1974 cotton crop "at a standstill."[45] The forward contract, which was intended to produce security for both parties, has proved a high risk proposition for the buyer in the courts, and has thus become less desirable as a commercial instrument.

In 1973 the nation's upland cotton crop was 12.9 million bales of which approximately seven million bales was sold for export.[46] The farm value (price paid by merchants and other direct buyers to the farmer) of the 1973 upland cotton crop totaled $2-3/4 billion.[47]

[44] The protection which would be afforded to a farmer by a forward contract for 1974 and thereafter is three-fold: First, securing a price above 38 cents renders price protection beyond the government target price; second, the forward price is the only protection for the value of the crop raised on acres not covered by the government allotment; and third, it enables the farmer to insure lenders that he has a market for the cotton at a price which will enable him to repay a commercial loan, thus becoming a basis for financing farm operations.

[45] **Cotton Situation CS-253 (April 1974)**, supra n. 31, p. 5.

[46] **Cotton Situation CS-253 (April 1974)**, supra n. 31, p. 7.

[47] **Cotton Situation CS-253 (April 1974)**, supra n. 31, p. 13.

Small, highly competitive cotton merchant firms such as Allenberg, as an industry group, bought and sold over $2 billion worth of cotton in 1973, principally on borrowed capital using the integrity of both purchase and sales contracts to protect themselves against adverse price movements.[48] Over half of their sales were for export.[49]

The basic principles of cotton merchandising, outlined above, are the same for every raw agricultural commodity merchandising group in the nation: wheat, soybeans, sugar, corn, etc.[50] The integrity of the merchant's contract with the initial source of supply, the farmer, is the foundation of the nation's commodity merchandising system.

Competition in every area of the nation for the farmer's crop is necessary to insure that proper price differentials are paid to the farmer and that the nation's agricultural resources are distributed on an economic basis. If state courts are permitted to introduce unexpected and extraordinary legal risks into the market place instead of the certain enforceability of contracts, and if potential purchasers of cotton or other commodities are foreclosed from bidding for contracts in a given state because they have not previously qualified there, this vital competition will be diminished.

In the current legislative session, the United States Congress is studying the marketing of the nation's agricultural commodities in connection with possible revision of the Commodity Exchange Act.[51] The report produced

[48] See materials at notes, 47, 17, 18, 11, supra.

[49] Cotton Situation (April 1974), supra n. 32, p. 5; and Hearings, supra n. 17.

[50] See, Small Business Problems Involved in the Marketing of Grain and Other Commodities, Report of the Subcommittee on Special Small Business Problems of the Permanent Select Committee on Small Business, 93rd Cong., 2d Sess. (House Report No. 93-963, of April 1, 1974).

[51] 7 U.S.C. Sec. 1 et seq.

as a result of that study is quoted below in part. The commodity used as an example in the quotation is wheat, and the problem addressed is the need to protect the integrity of contracts on the futures exchanges (by which purchases in the cash market are offset). But the observations made are equally applicable to cotton, and to the need to protect the integrity of contracts in the cash market (by which futures contracts are offset):

> *"It is now common practice for producers to contract with a local elevator in advance of the time the grain or fibers are harvested for the delivery of a certain number of units at a fixed price. Many creditors demand that the farmers forward contract* in order to reduce the risk these producers would have in the marketplace. Other producers forward contract on part of their crop in order to assure themselves that they will receive at least the cost of production. These local grain merchandisers either directly or through another medium almost always immediately sell the same volume of grain on the futures market by purchasing a short contract for a future month. In other words, they agree to either deliver the grain or buy the contract back at a specified time. Under this arrangement, they have been able to offset any losses or gains in the cash market which would occur on their inventory with a corresponding loss or gain on their futures contracts. *By using this system, elevators in the corn belt prior to this year were able to reduce the margin, that is, the amount they keep for themselves for handling the transactions, to around 3 cents per bushel and still make a reasonable profit. Without a place to hedge, however, these commodity merchants would have had to deduct a much larger margin for themselves.*
>
> *"Our marketing system has been, on an overall basis, a very good thing for producers, processors, consumers,*

and the nation as a whole. In fact, the system historically has operated so well that people within the system itself ***can not believe how near it is to collapsing and how vulnerable it is to manipulation and abuses***. One of the reasons that the vulnerability is not apparent is that for the last several years there has always been a surplus of most commodities and also an abundance of transportation to shift those commodities around so that if need be a commodity could be delivered in lieu of buying back a futures contract. This situation has now changed. We not only do not have a surplus but we also do not have an insulated reserve which could be used to reduce the height of the peaks and the depth of the valleys."[52]

A commodity merchant handles an enormous value of goods, trading at very small margins of profit. In the cotton industry about 1.6% of the cost of the retail cotton product goes for "merchandising" of raw fiber — "merchandising" includes the cost of marking, tagging, weighing, compressing, storing, loading, grading, buying, selling, financing, and transportation.[53] Cotton merchants who purchase raw cotton for resale are able to resell at small margins only if there is absolute certainty that both sales and purchase contracts will be honored.

". . . during the past 150 years the food and fiber segment of our economy has evolved from a status of self-sufficiency to one of intricate interdependency with great segments of our industrial economy . . . . The present agribusiness economy has come about by the

[52]**Report**, p. 7, op. cit, supra n. 50 (emphasis added).

[53]Wilcox and Cochrane, **Economics of American Agriculture** (Prentice-Hall, 2nd ed. 1960) pp. 128-131 citing U.S. Department of Agriculture statement prepared by Maurice Cooper and Frank Lowenstein.

gradual dispersion of functions from agriculture to business, particularly those relating to the manufacture of production supplies and the processing and distribution of food and fiber products. This has continued to the point where today agriculture retains primarily the function of producing crops and livestock.

"It is important to keep in mind that modern agribusiness is the result of a combination of forces actively at work for a century and a half and with roots running back even deeper into history. In no sense is it the result of a preconceived plan or design being carried to completion. Rather, it is the product of a complex of evolutionary forces more or less spontaneously at work without central guidance or direction. In fact, so gradual has been the development of agribusiness that students of agriculture and business largely have failed to recognize its significance."[54]

The evolution of our commodity merchandising system has included legislative and judicial steps to foster competition and protect the integrity of contracts upon which the system depends. The enactment of the Commodity Exchange Act was one such step. Another was the fostering of interstate competition for farm commodities by exempting foreign corporate buyers from local qualification requirements. The case of ***Dahnke-Walker Milling Co. v. Bondurant***, 257 U.S. 882 (1921), and numerous other cases and statutes following the rule of ***Dahnke*** have, over the years become integral parts of that "complex of evolutionary forces" which now constitute our agricultural marketing system.

[54]Davis and Goldberg, **A Concept of Agribusiness** (Harvard University Press 1957) 6.

Over one million bales of cotton in Mississippi were under forward contract in 1973, most of which were under contract to Memphis or other out-of-state merchants.[55] The immediate product of the decision of the Mississippi Supreme Court in this case was the repudiation of vast numbers of forward contracts and the filing of scores of lawsuits in the United States District Courts of Mississippi.[56]

To illustrate this 1973 situation, assume cotton merchant (CM) is a Tennessee corporation which has purchased cotton through independent local brokers in many of the fifteen states in the Cotton Belt, but principally in the "Memphis territory", consisting of Arkansas, Mississippi, Missouri, Louisiana, and Tennessee. CM has a net capital of two million dollars, making it one of the largest companies in the industry. With 90% bank financing CM can "own" cotton worth about twenty million dollars at any given time. With normal prices, volume, and turnover CM might buy and sell 150,000 to 200,000 bales of cotton a year.

In the spring of 1973 CM makes forward contracts with Mississippi farmers and under these contracts CM expects to receive 50,000 bales of cotton at $150.00 per bale (30 cents per pound) for a total purchase price of $7,500,000.00. CM hedges these purchases by sales on the New York Cotton Exchange or with cotton mills (as CM makes sales contracts with mills during the year it will 'take out' its hedge on the futures exchange by an offsetting trade, and replace the hedge on the futures exchange with a hedge created by a sale to a mill).

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[55]The bulk of the nation's cotton crop is merchandised through Memphis, Tennessee cotton merchants. **Cotton Situation (Oct. 1971)**, supra n. 25, at 13.

[56]**Allenberg Cotton Company, Inc., v. Coleman**, supra n. 37, at 428.

The price agreed with the farmer is based upon the price at which CM has a mill sale or at which CM can hedge on the exchange. By the end of the spring of 1973 CM has forward contracts to buy 50,000 bales of Mississippi cotton at 30 cents per pound, and has contracts to sell 50,000 bales at 35 cents per pound.

During 1973, the market price of cotton goes up to 85 cents; but contemporaneously, CM's contracts in Mississippi are rendered unenforceable by the decision of the Mississippi Supreme Court in this case. But CM must deliver 50,000 bales of cotton on its sales contracts at 35 cents per pound.

Despite the court decision, most (assume 80%) of the farmers with whom CM had contracts still deliver their cotton. On these contracts, CM receives a gross mark-up of $25.00 per bale (5 cents per pound). After freight, interest, storage, and other costs are paid CM makes a pretax net profit of $4.00 per bale or $80,000.00 on gross sales of $11,000,000.00 (40,000 bales at 35 cents per pound).

As to the 20% which is in default, CM must look to the open market. CM must deliver 10,000 bales to its customers at a price of 35 cents per pound, but replacement cotton would cost CM 85 cents. CM cannot borrow money to purchase replacement cotton for delivery at a loss, so it must use its net capital of two million dollars. But the purchase of 10,000 bales at 85 cents for delivery on 35 cent contracts would cost CM $2.5 million. CM, a merchant which might normally buy and sell 200,000 bales of cotton a year, is rendered bankrupt by defaults of 10,000 bales.

This was the situation faced in 1973, in varying degrees of severity, by an important part of the cotton industry as a result of the convergence of the price rise, and the abandonment of *Dahnke* in one state. Only the decisive re-establishment of *Dahnke* by the United States District

Court for the Northern District of Mississippi in the midst of the delivery season, prevented the financial ruin of that part of the cotton industry which had relied upon Mississippi forward contracts as a source of supply. The companion cases of ***Cone Mills Corporation v. Hurdle, et al.*** and ***Allenberg Cotton Company, Inc., v. Coleman, et al.***[57] were handed down on January 10, 1974, while prices were still at peak levels. Although the relief granted was preliminary,[58] the full dress opinion of the District Court made it clear that the contracts were enforceable in the federal courts.

C. The Procedural Posture of This Appeal

Prior to trial, Pittman filed an "Answer to [Allenberg's] Amended Bill of Complaint and Decree of Discovery" (A. 14) setting forth as an affirmative defense that Allenberg was "a foreign corporation doing business in the State of Mississippi and it is not qualified to do business in the State of Mississippi as required by § 5309-221 [sic] of the Mississippi Code of 1942 Annotated" (A. 16).

After hearing evidence on the circumstances concerning the making of the crop purchase contract and Allenberg's activities in Mississippi, and after argument by the parties, the Chancery Court of Quitman County rejected Pittman's affirmative defense, and expressly ruled, that Allenberg was not doing business within the State of Mississippi under § 5309-239 of the Mississippi Code of 1942 (A. 111).

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[57] Cited as **Allenberg Cotton Company, Inc., v. Coleman**, supra, n. 37.

[58] A preliminary mandatory injunction ordering delivery of the cotton at the contract price was granted in both cases. Since then, **Allenberg Cotton Company, Inc., v. Coleman** has been settled. **Cole Mills Corporation v. Hurdle, et al.** involving repudiations of contracts for about 4000 acres still pends on a calendar full of cotton cases.

§ 5309-221 of the Mississippi Code of 1942 is a companion to § 5309-239 and contains a listing of activities which are not "transacting business" under § 5309-239. § 5309-221 provides, inter alia, that "a foreign corporation shall not be considered to be transacting business in this state, for the purposes of this Act, by reason of carrying on in this state any one or more of the following activities: . . . (e) transacting any business in interstate commerce."

On appeal, the Supreme Court of Mississippi reversed, stating: "Nor is the transaction converted into interstate commerce because, after the cotton had been delivered to Allenberg at the warehouse in Marks and title thereto had become vested in Allenberg in Mississippi, Allenberg, at its own election and for its own purposes, might, afterward sell it in interstate commerce." Opinion of the Mississippi Supreme Court, ***Jurisdictional Statement***, p. A. 6. This was a flat rejection of Allenberg's contention that its activities were in interstate commerce.

A timely Petition for Rehearing was filed with the Mississippi Supreme Court on May 1, 1974.[3] The Petition of Rehearing argued that the decision of the Mississippi Supreme Court "is in direct violation of Clause 3 of Section VIII of Article I of the Constitution of the United States [the Commerce Clause] . . ." Petition for Rehearing, p. 17. The Petition contained an extensive briefing of ***Dahnke-Walker Milling Co. v. Bondurant***, 257 U.S. 282 (1921) in support of the Commerce Clause argument.

The Petition for Rehearing was denied without comment on May 14, 1974.[3]

On August 17, 1974,[3] the Mississippi Supreme Court entered an "Order Certifying Issues Decided." This Order provided:

IN THE SUPREME COURT OF MISSISSIPPI

BEN E. PITTMAN

VERSUS NO. 47,037

ALLENBERG COTTON COMPANY, INC.

ORDER CERTIFYING ISSUES DECIDED

On application of the appellee, Allenberg Cotton Company, Inc., this Court in addition to the orders made herein, hereby certifies and makes a part of the record in this case and of the judgment and entry of reversal heretofore rendered and made herein, that in this appeal from the Chancery Court of Quitman County, and in the arguments both oral and by brief made in this Court on behalf of the appellee on the original appeal and the petition of appellee for rehearing and brief filed in support thereof, it was insisted by appellee that under the facts of this case, the contract sued upon by the appellee was made in "interstate commerce" and thus entitled to protection as such under the applicable statutes of Mississippi and the Commerce Clause of the Federal Constitution; and that in its deliberation of this case, this Court both on the original appeal and the petition for rehearing considered these questions of interstate commerce; and it was the judgment of this Court that said contract was not made in interstate commerce, nor that the facts of the case showed appellee to be transacting business in interstate commerce within the meaning of the laws of Mississippi and that Mississippi Code 1942 Ann. Section 5309-239 (Supp. 1972) as applied by this Court in this case to the Allenberg Cotton Company, Inc., a Tennessee corporation, to bar it from maintaining suit in the courts of this state was not repugnant to the Commerce Clause of the United States Constitution;

and it was necessary to the Court's judgment in said case to determine said questions raised as to interstate commerce, and that such questions were determined adversely to the position of appellee.

It is hereby certified that this Court is the highest court of law and equity in the State of Mississippi in which a decision of this case could be had.

ORDERED, this the 17th day of August, 1973.

/s/ Robert G. Gillespie
CHIEF JUSTICE
SUPREME COURT OF MISSISSIPPI

SUMMARY OF ARGUMENT

I. THE SUPREME COURT HAS JURISDICTION OVER THIS APPEAL.

A. A CERTIFICATION BY A STATE COURT THAT HAS NECESSARILY DECIDED A FEDERAL QUESTION IS A SUFFICIENT SUBSTANTIATION TO SUPPORT JURISDICTION OVER THE QUESTION.

The requirement that a federal question has been presented and necessarily decided in the state court stems from the dual federal system, and the principle that the state courts are to be the final word on state law. *Murdock v. City of Memphis*, 87 U.S. 590 (1875); *Erie v. Tompkins*, 304 U.S. 64 (1938); Greene, *Hybrid State Law in the Federal Courts*, 83 Harv. L. Rev. 289, 319 (1969).

Where a state supreme court has necessarily decided a federal question, and has certified that it has done so, there can be no danger of improper intrusion by the Supreme Court into an area of state law. *Whitney v. California*, 274 U.S. 357, 360-1 (1926); *Manhattan Life Insurance Co. v. Cohen*, 234 U.S. 123, 134 (1913); *Coleman v. Alabama*, 377 U.S. 127, 133 (1964); Stern & Gressman, *Supreme Court Practice*(4th Ed.) 127 (1969).

The Certificate obtained by Appellant in this case establishes that the federal constitutional question was considered by the state court and that a decision of that issue was necessary for the decision of the case. *Jurisdictional Statement*, A. 1, A. 6. The Certificate was prepared by counsel following the form of certificate found sufficient in the previous decision of the Court of *Cincinnati, P.B.S. & P. Packet Co. v. Bay*,200 U.S. 179 (1905) which is reproduced for this purpose in Stern & Gressman, *Supreme Court Practice*(4th Ed.) 676 (1969).

Appellee asserts that because the Certificate was physically signed by only one justice, it is insufficient. The Certificate shows on its face it is a certificate of the *court*, using language identical to that of the certificate in *Cincinnati v. Bay*, which certificate was also physically signed by one justice of the state court. In addition, the Clerk of the Supreme Court of Mississippi has certified the document as an order of that *court*.

A certificate from a state supreme court that a constitutional question was raised and necessarily decided below should be conclusive. Further inquiry into the matter would intrude into an area of state concern, and irrationally distinguish between the weight given the opinion of the court below and its expressions taking a slightly different form. *Lynumn v. Illinois*, 368 U.S. 908, 372 U.S. 528 (1963); *Raley v. Ohio*, 360 U.S. 423 (1959); *Charleston Federal Savings & Loan Association v. Alderson*, 324 U.S. 182, 185-186 (1945).

B. WHERE A STATE STATUTE INCORPORATES A CONSTITUTIONALLY REQUIRED EXEMPTION, AND THE QUESTION OF APPLICATION OF THE EXEMPTION WAS DECIDED BELOW, THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW THE QUESTION.

Mississippi statutes expressly incorporate the constitutionally required exemption for foreign corporations whose only activity in Mississippi is transacting business in "interstate commerce." Mississippi Code 1942 Annotated §5309-221(e) (Supp. 1972). The statutory exemption was intended to incorporate the constitutional law (and must do so). Model Business Corporation Act Annotated §166, 2d Par. ¶4.05; *Allenberg Cotton Company, Inc. v. Coleman*, 369 F. Supp. 426 (N.D. Miss. 1974).

The Mississippi Supreme Court construed the statutory exemption not to apply to Allenberg's activities in Mississippi.

Where the meaning of a state statute depends upon federal law incorporated by it, a construction of the state statute interpreting federal law, presents a federal question for the Supreme Court and is not a state ground of decision. Robertson & Kirkham, ***Jurisdiction of the Supreme Court of the United States***, §99 (Wolfson & Kurland ed. 1951); ***Standard Oil Company v. Johnson***, 316 U.S. 481 (1942); ***Smith v. Kansas City Title & Trust Co.***, 225 U.S. 180 (1921); ***State Tax Commission v. Van Cott***, 306 U.S. 511 (1939).

C. A CHALLENGE TO STATE INTERFERENCE WITH CONSTITUTIONAL RIGHTS IS TIMELY ASSERTED IN A PETITION FOR REHEARING WHERE THAT VEHICLE PRESENTED THE FIRST OPPORTUNITY FOR THAT CHALLENGE AFTER ACTUAL INTERFERENCE WITH SUCH RIGHTS.

If it is assumed that the Mississippi statutory exemption for "interstate commerce" was wholly a matter of state law, it would still be the case that the Constitutional issue was timely raised. A litigant is not required to anticipate deprivation of constitutional rights or invoke their protection in advance of actual interference with those rights. ***Missouri ex rel Missouri Insurance Co. v. Gehner***, 281 U.S. 313 (1930); ***Brinkerhoff-Faris Trust & Savings Co. v. Hill***, 281 U.S. 673 (1930); ***Saunders v. Shaw***, 244 U.S. 317 (1917); ***United Public Workers v. Mitchell***, 330 U.S. 75 (1947). Since Allenberg won in the trial court and was exempted from the qualification requirement, the first actual interference with its Constitutional rights came

after the decision of the Mississippi Supreme Court. Allenberg's assertion in its Petition for Rehearing, that the state decision conflicted with the commerce clause, came at the first available time after the interference and thus was timely. ***Corn Products Refining Co. v. Eddy***, 249 U.S. 428, 432 (1919).

II. MISSISSIPPI'S REFUSAL TO ALLOW A FOREIGN CORPORATION TO ENFORCE ITS CONTRACT WITH A MISSISSIPPI RESIDENT FOR THE PURCHASE OF COTTON TO BE SHIPPED FROM THE STATE IS REPUGNANT TO THE COMMERCE CLAUSE.

A. APPLICATION OF THE *DAHNKE* PRINCIPLE.

The contract which is the subject of this suit was made after Pittman approached a local cotton broker, Mr. Covington, and asked Covington if he could obtain 22¢ per pound for his cotton. Covington was an independent, part-time broker who had no authority to make a contract. Covington relayed the offer to Allenberg in Memphis, Tennessee, by telephone, and after negotiations by telephone, a bargain was struck. Allenberg prepared a written contract, signed it in Memphis, and sent it to Mississippi where it was signed by Pittman. Contemporaneously Allenberg entered contracts to sell cotton to cotton mills outside of Mississippi in the expectation of receiving this and other cotton purchased by it. After growing and harvesting the cotton Pittman was to store it in a warehouse and deliver negotiable warehouse receipts to obtain payment. Allenberg would then classify Pittman's cotton, pool the bales into "even running lots" according to quality, and issue shipping orders to the warehouse to ship the even running lots to mills outside of Mississippi. Virtually all cotton grown in Mississippi is shipped outside of the state

because there is no significant milling activity in the state.

In all relevant features this case is on all fours with *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 882 (1921), where Kentucky courts were closed to enforcement of a contract by an unqualified foreign corporation buying wheat for shipment to Tennessee. Not only are the facts of the instant case and *Dahnke* strikingly parallel, the analysis applied and legal conclusions reached here by the Mississippi Supreme Court are identical to those of the Kentucky Supreme Court in the latter's decision which was reversed by the United States Supreme Court.

In *Dahnke* the United States Supreme Court held: "Where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation." This principle was not applied by the Mississippi Supreme Court in the present case.

The principle applied in *Dahnke* in 1921 had been applied in many previous cases: *International Text Book Co. v. Pigg*, 217 U.S. 91 (1910); *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899); *Swift & Co. v. United States*, 196 U.S. 375 (1905); *Robbins v. Shelby County Taxing District*, 120 U.S. 489 (1887).

Before the depression the court applied the principle in a number of important cases involving the Commerce Clause, both to uphold the exercise of Congressional power, and to protect the national common market in commodities from actions by the states. *Lemke v. Farmer's Grain Co.*, 258 U.S. 51 (1922); *Stafford v. Wallace*, 258 U.S. 495 (1922); *Shafer v. Farmers' Grain Company*, 268 U.S. 187 (1925); *Flanagan v. Federal Coal Company*, 267 U.S. 222 (1925).

In the post-depression cases the *Dahnke* principle that "where commodities are bought for use beyond state lines, the purchase is a part of interstate commerce" was reaffirmed in decisions upholding Congressional regulation of such purchases. *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533, 568-69 (1939) (citing *Dahnke*, *Stafford*, and *Lemke*); *H. P. Hood & Sons v. United States*, 307 U.S. 588 (1939); *Currins v. Wallace*, 306 U.S. 1 (1939) (citing *Dahnke*, *Swift & Co.*, *Lemke*, *Stafford*, *Flanagan* and *Shafer*.)

Congress has adopted the principle in legislation central to the activities of the cotton merchandising industry. 7 U.S.C. §§1, 3 (The Commodity Exchange Act): "... a transaction in respect to [cotton] ... shall be considered to be in interstate commerce if such article is part of that current of commerce usual in the commodities trade ... including ... all cases where purchase ... is ... for shipment to another State ..."

Congress has declared, as a matter of policy (7 U.S.C. §2101),: "Cotton moves in large part in the channels of interstate and foreign commerce and such cotton which does not move in such channels directly burdens or affects interstate commerce in cotton and cotton products. All cotton produced in the United States is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects interstate or foreign commerce in cotton and cotton products."

Congressional definition of the scope of interstate commerce is entitled to great, if not controlling, weight. *Prudential Insurance v. Benjamin*, 328 U.S. 408 (1946); *State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451 (1962).

The principles set forth in prior cases, especially where economic and commercial relationships have been

established on the assumption of their continuing validity, should be changed by Congress, not the Court. *Flood v. Kuhn*, 407 U.S. 258 (1972). The negative consequences of the retroactive effect of a judicial change is illustrated by the traumatic experience of the cotton industry in 1973 following the decision of the Mississippi Supreme Court in this case. That decision coincided with an enormous price rise and scores of contracts were repudiated in Mississippi (there were also repudiations of lesser numbers in Alabama and Arkansas which have laws similar to Mississippi's in banning remedial qualification). Disaster was avoided only by the decisive action of the United States District Court for the Northern District of Mississippi in *Allenberg Cotton Company, Inc. v. Coleman* granting preliminary enforcement of the contracts. Many of these cases still pend.

Cotton commodity purchasing practices are substantially the same as those of other commodities. If *Dahnke* is suddenly reversed the adverse consequences suffered in Mississippi in 1973, may be duplicated in other industries in other states.

For these reasons *Dahnke* should not be reconsidered.

B. RECONSIDERATION OF *DAHNKE*.

If *Dahnke* were considered de novo its rule would still be adopted.

In addition to the retroactive burdens imposed by reversal of *Dahnke* there are prospective burdens. Under the rule sought to be applied in Mississippi, it will be necessary for any foreign corporation potentially interested in buying in Mississippi to qualify even before entering a contract. To fail to do so is to risk breach of the contract at any time after the "ink dries," without the protection of state enforcement.

Potential competition may restrain other buyers from underpaying those from whom they buy. *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 173-74 (1964). But under the rule of the decision below, if cotton firms have not previously qualified they will not even bid in the state, for if a bid were accepted, the contract made must be instantaneously offset by sale, or hedge on the New York Cotton Exchange, and the buyer would be at the seller's mercy. If the market then went up, the farmer could enforce the contract, but if the market went down, the merchant could not enforce it against the farmer. As a result of these considerations a state having such a law would become a separate marketing area, and entrenched firms would bid for its commodities free from potential competition.

The *Dahnke* rule is also desirable because it allows the buyer to judge the legal effect of its action from the nature of the transaction, not its size. It is highly important that the parties involved be able to determine the legal effects of their actions through clearly defined rules. *Kosydar v. National Cash Register Co.*, 42 Law Week 4767 (1974). Applying the Constitutional exemption only to firms which had not done "too much" buying in Mississippi would mean abandonment of a long established, clearly defined rule for one which was completely ambiguous.

To weigh against the negative effects of abandonment of *Dahnke*, what interests of the state of Mississippi would be served? The ostensible purpose of local qualification is to insure availability of a person on whom valid process may be served. Note, *Foreign Corporations—State Boundaries for National Business*, 59 Yale L.J. 737, 743 (1959). But in this respect the statute is superfluous because today every state provides for service under long-arm statutes.

Absolute prohibition of access to the courts as a penalty for failing to qualify is a 'harsh, capricious and vindictive measure *** ... the amount of this punishment bears no relation to the amount of wrong done to the State in failure to qualify and pay its taxes. The penalty thus suffered does not go to the State, which has sustained the injury, but results in unjust enrichment of the debtor..." *Woods v. Interstate Realty Co.*, 337 U.S. 535 539-40 (1949) (Mr. Justice Jackson, dissenting).

In cases upholding state regulation over a claim of burdensome effect on national interests the court has found either a specific state design to correct a real problem of legitimate local concern, or little, if any, detrimental effect to the federal common market. In *Parker v. Brown*, 317 U.S. 341 (1943), the court determined that "the evils attending the production and marketing of raisins in that state present a problem local in character and urgently demanding state action ... *** ... the national government has contributed to these efforts ... by aiding programs sponsored by the State. *** Hence we cannot say that the effect of the state program on interstate commerce is one which conflicts with Congressional policy." The Mississippi law is not specifically designed to correct a significant problem of real local concern. Nor does it dovetail with Congressional policy. By discouraging the practice of forward contracting it strikes at the cornerstone of the new federal farm programs established under P.L. 91-524 and P.L. 93-86 (See material at ftns. 22-45, Statement of the case).

To uphold the state action it must also appear that the local interest could not be promoted as well within a lesser impact on interstate activities. *Pike v. Bruce Church*, 397 U.S. 137 (1970). Most states have not found that an absolute enforcement bar is necessary to promote the local

interest in requiring qualification. In 42 states the statutory bar to enforcement may be removed by subsequent qualification. Certainly allowing cure of the disability would promote any legitimate state interest with a lesser impact upon interstate activities. Therefore, the Mississippi law also fails to meet the test of *Pike v. Bruce Church*.

Appellant Allenberg Cotton Company, Inc., has acted in complete good faith in a commercially reasonable manner. It has relied upon the promises of the Appellee in the contract, and upon the continuing validity of long-standing principles incorporated in statutes, the case law, and commercial practice. The abandonment of *Dahnke* would be deleterious to current federal farm programs, risk commercial upheaval, inflict hardship on cotton merchants currently seeking to enforce 1973 forward contracts, reduce competition, and would produce windfall rewards for immoral conduct. The legitimate interests of the State of Mississippi could be equally well served by other devices with a lesser impact on interstate activities, and do not require the implementation of the present "harsh, vindictive and capricious" law by this Court.

ARGUMENT

I. THE SUPREME COURT HAS JURISDICTION OF THIS APPEAL

A. A CERTIFICATION BY A STATE COURT THAT IT HAS NECESSARILY DECIDED A FEDERAL QUESTION IS A SUFFICIENT SUBSTANTIATION TO SUPPORT JURISDICTION OVER THE QUESTION.

Appellant invokes the jurisdiction of the Supreme Court by appeal pursuant to 28 U.S.C. § 1257 (2), and alternatively, by application for certiorari as allowed by 28 U.S.C. §2103.

Jurisdictional Statement, p. 2. In either case a federal question must be timely presented, and it must appear that no adequate, independent state ground will support the judgment. *Murdock v. City of Memphis*, 87 U.S. 590 (1875).

The Supreme Court does not review a case from a state court which can be supported on a non-federal ground because of a fundamental concept underlying the federal system: the state courts are to be the final authorities on matters of state law, while federal courts are to have the final word on federal questions. "*Murdock* rests in large part on the fear that a contrary result would put litigants able to raise a federal question in a favorable position. They, and only they, could place their state law questions before the Supreme Court. Two systems of state law, one for those who have access to the Supreme Court and one for those who do not, might develop. Such a result would contradict the basic rationale of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), that state courts are the final expositers of state law." Greene, *Hybrid State Law in Federal Courts*, 83 Harv. L. Rev. 289, 319 (1969).

Where, however, the highest state court has certified the ground for decision as federal, there can be no danger of improper intrusion by the Supreme Court into an area of state law, nor any danger of development of a dual system of state law. "Where the highest state court assumes or holds that a federal question is properly before it and then proceeds to consider and dispose of that issue, the Supreme Court's concern with the proper raising of the federal question in the state court disappears. *Whitney v. California*, 274 U S. 357, 360-1 (1926); *Manhattan Life Insurance Co. v. Cohen*, 234 U.S. 123, 134 (1913); *Coleman v. Alabama*, 377 U.S. 127, 133 (1964)." Stern and Gressman, *Supreme Court Practice* (4th ed.) 127 (1969).

The opinion rendered by the Mississippi Supreme Court in the present case concludes "nor is the transaction converted into interstate commerce because, after the cotton had been delivered to Allenberg at the warehouse in Marks and title thereto had become vested in Allenberg in Mississippi, Allenberg, at its own election and for its own purposes, might afterward sell it in interstate commerce." Opinion of the Mississippi Supreme Court, *Jurisdictional Statement* A. 1, A. 6.

Appellee has argued that because the Mississippi statute requiring qualification of foreign corporations contains an express exemption for transacting business in interstate commerce (Mississippi Code 1942 Annotated § 5309-211(e)) the decision below should be interpreted as a decision of state law only. *Motion to Dismiss or Affirm*, *pp. 6-8.*

In part I.B. of this Brief, Appellant considers whether such an interpretation is sound. In part I.C. of this Brief, Appellant considers the jurisdictional consequences of adopting this interpretation, and whether an adequate and independent state ground for the decision is possible. Here, however, it is assumed that the opinion below had rendered the record ambiguous regarding whether a federal question was raised, and the effect of the certificate obtained is considered.

Since the opinion below neither stated that the interstate commerce exemption in the Mississippi statute was considered coextensive with the Constitutional exemption, nor stated that it was not, Appellant applied to the Mississippi Supreme Court for a certificate clarifying the record. Appellant presented the Mississippi Supreme Court a draft certificate prepared following the wording of the certificate which was accepted as sufficient in *Cincinnati, P.B.S. & R. Packet Co. v. Bay*, 200 U.S. 179 (1905). This is also the form printed for the assistance of counsel in Stern &

Gresman, *Supreme Court Practice* (4th ed.) 676 (1969). The certificate obtained by the Appellant, like the certificate obtained in *Cincinnati, P.B.S. & P. Packet Co. v. Bay*, was physically signed by one justice of the state supreme court and made a part of the record.

The Appellee has asserted that this certificate, having been *signed* by only one justice, is not conclusive. *Motion to Dismiss or Affirm*, p. 5. This argument elevates form over substance to a ridiculous degree. Appellee presumably would require that the signatures of all five justices of the Mississippi Supreme Court appear on the document.

The certificate obtained shows on its face that it is the certificate of the *court*. The language of the certificate used to express this conclusion is the language used in *Cincinnati, etc. v. Bay*, to-wit: "[On motion of (name of party)] this court in addition to the orders made herein, orders it to be certified and made a part of the record in this case and of the judgment and entry of reversal heretofore rendered and made herein . . . " Compare *Cincinnati, etc. v. Bay*, with Order Certifying Issues Decided, *Jurisdictional Statement* pp. A. 12-A. 13.

In addition, Julia H. Kendrick, Clerk of the Mississippi Supreme Court has certified the copy of the certificate which is reprinted in the *Jurisdictional Statement* as: "a true and correct copy of the Order Certifying Issues Decided *by the Court in the case of* Ben E. Pittman versus Allenberg Cotton Company, Inc., No. 47,037 — as the same appears *of record* on file in my office. Given my hand, *with the seal of the said court affixed*, at office, in the City of Jackson, Mississippi, this the 17th day of August, A.D. 1973. /s/ Julia H. Kendrick, Supreme Court Clerk." (emphasis added) *Jurisdictional Statement*, p. A. 12. It would appear that either the signature of Robert G. Gillespie. Chief Justice of the Mississippi Supreme Court, or

the signature of Julia H. Kendrick, Clerk of that Court, would be sufficient to establish that the action was in fact taken by the Court.

Once it is established that the certificate in this case is what it purports to be, a certificate by the court, what effect should it be given?

The reason for obtaining the certificate is to avoid the chance of intrusion by the Supreme Court into areas of state law. A certificate that the decision of the federal question was necessary to the judgment is a certification that state law was not independently controlling. If the Supreme Court looks behind the certificate to disagree with the state court on this point, it intrudes into areas which should be left to the state.

Moreover, there is no reason to give less credence to a certificate of a state court made a part of the record and the judgment, than to the opinion and judgment of the court.

> "That rule, we feel, should state that a certificate of a state court is conclusive as to whether a federal question has been raised and decided. We cannot see any reason for distinguishing between an opinion of a state court and a judicial expression taking some other form. Since the Supreme Court will not inquire whether a federal question has been properly presented when the opinion of the highest state court demonstrates that it has been considered, it should not give less weight to a state court certificate, made part of the record."

Wolfson & Kurland, *Certificates by State Courts of the Existence of a Federal Question*, 63 Harv. L. Rev. 111, 117 (1960).

In *Lynumn v. Illinois*, 368 U.S. 908, 372 U.S. 528, 535-536 (1963) where the Constitutional question did not

appear to have been timely raised below, a certificate from the Illinois Supreme Court was held conclusive to establish the jurisdiction of the United States Supreme Court. This sound conclusion is required by the principle that further inquiry into how and when a federal question was raised is uncalled for once it appears that the highest state court has passed on it. ***Raley v. Ohio***, 360 U.S. 423, 436 (1959); ***Charleston Federal Savings & Loan Association v. Alderson***, 324 U.S. 182, 185-6 (1945).

B. WHERE A STATE STATUTE INCORPORATES A CONSTITUTIONALLY REQUIRED EXEMPTION, AND THE QUESTION OF APPLICATION OF THE EXEMPTION WAS DECIDED BELOW, THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW THE QUESTION.

The Mississippi statute requiring qualification of foreign corporations expressly incorprates the Constitutionally required exemption for foreign corporation whose only activity in Mississippi is 'transacting any business in interstate commerce." Mississippi Code 1942 Annotated § 5309-221(e) (Supp. 1972).

This exemption for interstate commerce was taken from the Model Business Corporation Act § 106, 2d Par. This is admitted by Appellee. ***Motion to Dismiss or Affirm***, p. 2, ftn. 3.

The "interstate commerce" exemption of the Model Business Corporation Act § 106, 2d Par., is intended to conform the act to the Constitutional mandate of ***International Text Book Co. v. Pigg***, 217 U.S. 91 (1909); ***Dahnke-Walker Milling Co. v. Bondurant***, 257 U.S. 282 (1921); ***Union Brokerage Co. v. Jensen***, 322 U.S. 202 (1944); and ***Eli Lilly & Company v. Sav-On-Drugs, Inc.***, 366 U.S. 276

(1960). Model Business Corporation Act Annotated (2nd Ed. 1971) § 106. 2d Par., ¶4.05.

In a case decided since the instant case, the United States District Court for the Northern District of Mississippi, sitting as a state court in a diversity action raising identical substantive issues, held that "the [Mississippi] state legislature intended to adopt the federal constitutional standard when it enacted the interstate commerce exception to the qualification requirements. Therefore, a Mississippi court, when determining what activities constitute interstate commerce within the contemplation of the exempting statute, would consider itself bound by the express language of § 79-3-289 [Formerly Mississippi Code 1942 Annotated § 5309-312 (Supp. 1972). The Mississippi statutes were recodified in 1973.] of the Mississippi Code to apply the federal standard, if indeed there is any difference between the state and federal standards." ***Allenberg Cotton Company, Inc. v. Coleman***, 369 F. Supp. 426 (N.D. Miss. 1974).

If this conclusion were not correct, these words of the Mississippi qualification statute would be meaningless: "The provisions of this act shall apply to commerce with foreign nations and among the several states only in so far as the same may be permitted under the provisions of the Constitution of the United States." Mississippi Code 1942 Annotated § 5309-312 (Supp. 1972).

It is conceded by Appellee (see ***Motion to Dismiss or Affirm***, pp. 7-10), as it must be, that the question whether Appellant's activities were within the statutory exception for "interstate commerce" was fully argued, considered, and decided in the proceedings below. Therefore, the record presents a case in which a Constitutional question. incorporated by reference within state law, was raised and decided below.

"Where the meaning of a state statute depends upon federal law, incorporated by it, a construction of that state statute, interpreting federal law, presents a federal question for the Supreme Court and is not a state ground of decision." Robertson & Kirkham, ***Jurisdiction of the Supreme Court of the United States***, § 99 (Wolfson & Kurland ed. 1951); ***Standard Oil Company v. Johnson***, 316 U.S. 481 (1942); ***Smith v. Kansas City Title & Trust Co.***, 255 U.S. 180 (1921); ***State Tax Commission v. Van Cott***, 306 U.S. 511 (1939).

"There are various ways in which the validity of a state statute may be drawn into question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time and if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." ***New York ex rel. Bryant v. Zimmerman***, 278 U.S. 63 (1928).

The law of jurisdiction raises problems which are often technical in nature. But underlying their solutions are matters of substance in the practical working of the dual system and in the effective conduct of the business of the Supreme Court. The solution to these problems should not depend upon talismanic words or rigid formulas. The duties of the Supreme Court should not hang on a thread of mere verbalism.

Appellee's argument that this case may not be reviewed reduces to the proposition: 'It is not reviewable because it was not expressly stated to the court below (prior to the Petition for Rehearing) that if it erred in applying the Constitutionally required exemption contained in the statute,

it would also err in applying the Constitutional exemption which existed independent of the statute.' Certainly the empty formalism of this argument cannot restrain the Supreme Court from reviewing the lower court's conclusion on precisely the same Constitutional issue which was decided in the lower court.

If the exemption recognized by § 5309-221(e) had not been expressed in terms in the statute, the Mississippi court would, nevertheless, have been required to recognize it if asserted by Appellee. In such a case, the Supreme Court would have jurisdiction to review the lower court's conclusions on that issue. Where the statute in terms recognizes the exemption, and the issue of its application to Appellee has been joined, the result should not be otherwise.

The dual federal system has produced many varying devices to harmonize our two systems of law. One such device is the incorporation of federal law by reference in state statutes. See Koenig, ***Federal and State Cooperation Under the Constitution***, 36 Mich. L. Rev. 752 (1938). The Supreme Court has recognized that a federal question is presented in a case in which the meaning of a state statute turns on a question of an incorporated federal rule, even where there was no compulsion that the federal rule be incorporated. When this conclusion was adopted there was criticism of it on the ground that such a case would present only a question of state law, since the state was free to adopt the federal rule or not as it saw fit. ***Smith v. Kansas City Title & Trust Co.***, supra, at 214 (Holmes, J., dissenting). However, in the instant case not even this objection can be raised since the state of Mississippi had no choice but to recognize, either legislatively or judicially, the exemption for interstate commerce.

Speaking of the Mississippi statute in ***Allenberg Cotton Co., Inc. v. Coleman***, Judge Smith said, "It would be unrealistic to conclude that the interstate commerce exception was enacted as a voluntary exercise of legislative grace. It is a recognition of a constraint imposed upon state power by the Commerce Clause."

The instant case is similar to ***Perkins v. Benquet Consolidated Mining Company***, 342 U.S. 437 (1952). In ***Perkins***, the Ohio Supreme Court had held that a certain foreign corporation was not subject to service of process in Ohio. The official opinion of the Ohio court did not indicate whether that court had rested its decision on Ohio law or on the Fourteenth Amendment. However, based on comments made in a concurring opinion, (although these were admittedly not definitive) the United States Supreme Court concluded that Ohio had intended to authorize extra-territorial service of process to the extent permitted by due process. The Supreme Court took jurisdiction because "to allow the judgment to stand as it is would risk an affirmation of a decision which ***might*** have been decided differently if the court below had felt free, under our decisions, to do so." ***Perkins***, at 443 (emphasis added).

In the present case, no speculation on the outcome is necessary. Clearly, if the Constitutional scope of permissible state authority were less than that assumed by the Mississippi court, this case would have been decided differently. Nor is speculation on the intended scope of state authority necessary since legislative history (the Model Business Corporation Act), recent precedent (***Allenberg Cotton Company, Inc. v. Coleman***), and the Mississippi qualification statute itself (§ 5309-312) show the intent that the state qualification requirement be coextensive with that required by the Commerce Clause.

There can be no question that insofar as may be relevant to this case, the two exemptions must be coextensive.

Although the state exemption might be broader than the Constitutional, the Supremacy Clause requires that the exemption given by the state not be narrower. If the Constitutional exemption applied to Allenberg, the state exemption must also. No certificate is necessary to show that by failing to extend the state exemption to Allenberg the court below must have also believed that the Constitutional exemption did not apply.

In this case, therefore, the two exemptions are coextensive. To address one question is to address the other. Both the lower court and the Supreme Court have the same responsibility in determining whether Allenberg's activities are protected by the exemption. However, the Supreme Court's decision is paramount. Mere semantics should not prevent the final arbiter of the scope of that exemption from considering whether it was properly applied in the court below.

Speaking of the authority of the Supreme Court to review cases like the present, one commentator has reached these conclusions: "[In cases where the state, either explicitly by statute or by judicial interpretation, decides that its authority will be exercised to the limits of Constitutional power] federal law is not simply being borrowed by the state to serve its own purposes. It is independently relevant in the fact situations presented. It comes into play only if the state attempts to sweep too broadly. But assumption of federal jurisdiction does not thrust the federal courts into areas reserved to the states. No Constitutional barrier therefore prohibits Supreme Court review. And, as in the earlier cases, the language of the jurisdictional statute is sufficiently broad—one can find a federal right being 'set up or claimed' whenever a state decision is made to turn upon an interpretation of the Constitution or the laws of the United States. The court

is therefore fully justified in assuming jurisdiction." Greene, *Hybrid State Law in the Federal Courts*, 83 Harv. L. Rev. 289, 315 (1969).

These considerations may lead the Supreme Court to the procedural conclusion that this "appeal" be considered upon writ of certiorari, 28 U.S.C. § 1257 (3), on the ground that a federal right has been "set up or claimed." It is settled that an appeal may be treated as certiorari, *Longest v. Langsford*, 274 U.S. 499 (1927), and in its *Jurisdictional Statement*, Appellant has alternatively prayed for certiorari.

These considerations may also lead to the procedural conclusion that, after hearing the case on the merits, should the Supreme Court conclude that the state court has misconstrued the scope of the Constitutional exemption incorporated in state law. it should reverse only that conclusion, and remand the case to the Mississippi court for further consistent proceedings as was done in *Perkins*, *Standard Oil Co.*, and *Van Cott*. However, Appellant would suggest that these procedural conclusions, while not opposed by Appellant, would be inappropriate.

The Constitutional exemption invoked by Appellant applies of its own force as a limitation upon state power. Although the legislature of Mississippi has incorporated it into its statute as a measure of the scope of the legal obligation imposed upon foreign corporations to qualify, the Mississippi court has refused to apply the exemption to Appellant, and has imposed the obligation to qualify. Appellant contends that the state application of the obligation to qualify has not been consistent with the Commerce Clause. The application of a statute by a state court is itself state law, the validity of which may be drawn into question on the ground of its repugnance to the Constitution. A challenge to the application of the state law on the ground of its repugnance to the Constitution is properly brought by

appeal. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U S. 282 (1921), and see dissent of Brandeis, J.; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 61, n.3. Thus appeal is the proper vehicle for this case.

Remand is unnecessary whether the case is heard by appeal or by certiorari. If the Constitutional challenge is sustained, ipso facto, the state application of law is struck down as inconsistent with the Commerce Clause. *Dahnke*. Complete disposition of the case is accomplished by the ruling on the Constitutional issue because the outer limit of the authority of the state statute to impose qualification requirements is the beginning of the Constitutional exemption. Since the case may be concluded by the determination of the scope of the Constitutional exemption, remanding the case for application of the state law would be a useless act.

The compulsory and final effect of a reversal in this case distinguishes it from cases where final determination of the controversy required the further application of state law, e.g. *Perkins*. In the later case, remand is appropriate. In the instant case the Constitutional exemption resolves the case without assistance by state law. It is self-executing, and remand is unnecessary. *Evans v. Newton*, 382 U.S. 296 (1966).

C. A CHALLENGE TO STATE INTERFERENCE WITH CONSTITUTIONAL RIGHTS IS TIMELY ASSERTED IN A PETITION FOR REHEARING WHERE THAT VEHICLE PRESENTED THE FIRST OPPORTUNITY FOR THAT CHALLENGE AFTER ACTUAL INTERFERENCE WITH SUCH RIGHTS.

Although it makes no sense to assume that the interstate commerce exemption in § 5309-211(e) is merely an

independent creature of state law, that assumption is essential to sustain Appellee's argument that the Constitutional issue was not timely raised below.

However, if this illogical assumption is made it would still be the case that the Constitutional issue was timely raised.

It is admitted by Appellee that a Constitutional challenge to the Mississippi Supreme Court decision was made in the Petition for Rehearing in which the argument was made that the failure to exempt Appellant from the qualification requirements violated the Commerce Clause, and *Dahnke* was cited. *Motion to Dismiss or Affirm*, p. 10. It is also admitted that since Appellant Allenberg had won in the trial court it was not required, under Mississippi practice, to delineate the issues raised by the case in the Mississippi Supreme Court. *Motion to Dismiss or Affirm*, p. 6. The Rules of the Mississippi Supreme Court make no such provision.

In these procedural aspects, the Rules of the Mississippi Supreme Court reflect the normal understanding of the procedure and function of appellate courts. In an appeal it is the responsibility of the Appellant to challenge the result below. The Appellee is required only to respond, not to mount its own challenge to hypothetical results in the appellate court. The Appellee is entitled to assume its Constitutional rights will be honored. Until there is actual interference with its Constitutional rights, no insistence upon them is necessary, nor does such a hypothetical insistence present a justiciable issue. *Poe v. Ullman*, 367 U.S. 497 (1961). Any other rule would obscure the issues before the court, and make the preservation of Constitutional arguments depend solely upon the imagination of counsel.

"The power of courts . . . to pass upon the Constitutionality of acts . . . arises only when the interests of litigants requires the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough." ***United Public Workers v. Mitchell***, 330 U.S. 75 (1947).

Allenberg Cotton Company, Inc., having been exempted by the trial court from the qualification requirement, could not have assailed that action in the Mississippi Supreme Court as having violated the Constitution of the United States. No application of the Mississippi qualification statute encroached upon Allenberg's rights until the action of the Mississippi Supreme Court. A litigant is not required to anticipate deprivation of Constitutional rights or invoke their protection in advance of actual interference. ***Missouri ex rel. Missouri Insurance Co. v. Gehner***, 281 U.S. 313 (1930); ***Brinkerhoff-Faris Trust and Savings Co. v. Hill***, 281 U.S. 673 (1930); ***Saunders v. Shaw***, 244 U.S. 317 (1917).

In *Gehner* a Missouri Board of Equalization assessed a company's taxable personal property at $50,000.00. The Board excluded from the assessment the value of certain United States bonds. The company appealed the assessment of $50,000.00. On appeal, the Missouri Supreme Court held, inter alia, that the value of the bonds should be included in the assessment. Then in its Motion for Rehearing the company first challenged the inclusion of the United States bonds in the assessment as a violation of the Constitution and federal statutes. The motion also made other arguments. In response to the motion, the court modified the details of its calculations in particulars not relevant to the federal questions and did not refer to the federal questions. The United States Supreme Court took jurisdiction on appeal holding "here the company, at the first opportunity, invoked the protection of the Federal

Constitution and statute. It could not earlier have assailed the section as violative of the Constitution and laws of the United States." *Gehner*, supra, at 320.

In the instant case, if the § 5309-211(e) exemption for interstate commerce is a Constitutional exemption, the question of its application is a federal question reviewable by the Supreme Court for the reasons set forth in Part I. B. of this Brief. If application of the exemption presents only a question of state law, since actual interference must precede the invocation of Constitutional protection, the assertion of those rights in the Petition for Rehearing was timely.

The rule requiring actual interference is the sound product of judicial restraint. Without such a rule, litigants would needlessly obfuscate the issues before appellate courts with imaginary challenges to hypothetical decisions. Of course, in Commerce Clause cases, the actual interference rule may produce a Constitutional confrontation somewhat later in the day than usual, since there may be no interference with Constitutional rights until the decision of the state court. An extreme example of this is presented in ***Corn Products Refining Co. v. Eddy***, 249 U.S. 428, 432 (1919):

> "We turn to the questions raised under the commerce clause and the act of Congress.
>
> "Although the supreme court in its opinion said nothing about interstate commerce, it cannot be doubted, in the state of the record, that defendants' activities against which relief was sought included incidental interference with plaintiff's interstate commerce in the "Mary Jane" syrup; and that the general judgment in favor of defendants amounts to an adjudication that the state law and regulations are to be enforced with respect to plaintiff's product indiscriminately, not only when sold and offered

> for sale in domestic commerce, but also while in the hands of the importing dealers for sale in the original packages, hence, in contemplation of law, still in the course of commerce from state to state. The silence of the supreme court upon the subject cannot change the result in this regard. In cases of this kind, we are concerned not with the characterization or construction of the state law by the state court, nor even with the question whether it has in terms been construed, but solely with the effect and operation of the law as put in force by the state."

The Supreme Court then went on to consider the Commerce Clause question in the *Corn Products* case.

Under *Corn Products*, it would seem that where there has been no interference with rights under the Commerce Clause until the state supreme court decision, it is not even necessary to raise the Commerce Clause question below (such as by Petition for Rehearing). However, it is not necessary to decide this question in the present case because the question was raised below, and the question was raised in a timely manner at the first opportunity after interference with Constitutional protections.

The reasons given here demonstrate why the opinion below, however interpreted, cannot be taken to establish an adequate and independent state ground for the decision, and that, therefore, the rule of *Herb v. Pitcairn*, 324 U.S. 117, 128 (1945), does not apply. Here there was only one relevant decision: that Appellant was not transacting business in interstate commerce. If this was solely a decision of state law, the decision itself established, for the first time in the case, an actual interference with Appellant's Constitutional protections under the Commerce Clause. No adequate, independent state ground could protect the decision from Constitutional challenge. The

reasons given for the decision are irrelevant. As in *Corn Products*, the effect of the decision, which constituted actual interference, was all that mattered. Appellant then asserted in the Petition for Rehearing that the application of state law to it conflicted with the Commerce Clause. This was all that was necessary (possibly more than was necessary) to preserve the ability of Appellant to challenge the Constitutionality of the decision in the United States Supreme Court.

II. MISSISSIPPI'S REFUSAL TO ALLOW A FOREIGN CORPORATION TO ENFORCE ITS CONTRACT WITH A MISSISSIPPI RESIDENT FOR THE PURCHASE OF COTTON TO BE SHIPPED FROM THE STATE IS REPUGNANT TO THE COMMERCE CLAUSE.

A. APPLICATION OF THE *DAHNKE* PRINCIPLE.

In this case, Allenberg Cotton Company, Inc., a cotton merchant incorporated in Tennessee, which ~~buys~~ buys cotton in many states, and resells in many states and in foreign countries, was prohibited from enforcing its cotton purchase contract in Mississippi because it had not qualified to do business there. Under Mississippi Code 1942 Annotated, § 5309-239, as applied to Allenberg by the Mississippi Supreme Court, making Allenberg's contract for the purchase of cotton was deemed to be the transaction of business in Mississippi. Since Allenberg did not have a certificate of authority it was prohibited from maintaining any action in any Mississippi court to enforce rights arising out of that contract. It is settled, as a matter of Mississippi law, and the Mississippi court reaffirmed in this case, that if a foreign corporation enters into a contract in Mississippi and a cause of action arises under that contract, its qualification after the cause of action has arisen will not lift the prohibition. Having been unqualified at the

crucial time, it is forever barred from enforcing its contract. (Opinion of Mississippi Supreme Court, *Jurisdictional Statement*, p. A. 6).

The prohibition from use of the state courts also applies to the federal courts. *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949).

This case is controlled by *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 882 (1921) and other decisions, the rule of which was not applied by the Mississippi Supreme Court. These cases established and applied the rule that purchases of raw agricultural commodities in one state for shipment out of that state are "interstate commerce" and therefore in a category which Congress may regulate, and which may not, in some respects, be regulated by the state. In this case the State of Mississippi has refused to give access to her courts to a buyer seeking to enforce such a purchase contract. In *Dahnke*, in an almost identical transaction, the United States Supreme Court held that such refusal (in that case by Kentucky) was unlawful, concluding (*Dahnke*, at 292-93):

> "For these reasons we are of opinion that the transaction was a part of interstate commerce, in which the plaintiff lawfully could engage without any permission from the state of Kentucky, and that the statute in question, which concededly imposed burdensome conditions, was, as to that transaction, invalid because repugnant to the commerce clause."

In *Dahnke*, the Kentucky Supreme Court found the facts of the case to be as follows (*Bondurant v. Dahnke-Walker Milling Co.*, 195 S.W. 139, 140 (Ken. 1917), affirmed after retrial 195 S.W. 76 (Ken. 1917)):

> "There were some minor differences in the evidence, as to the terms of the contract, but the undisputed facts

proven, about which there were no contradictions, show that the terms of the contract were that about the 15th day of June, 1915, or a few days thereafter, the appellant and John Creed, an agent of appellee, entered into the contract sued upon at Hickman, Ky.; that both appellant and Creed were citizens of Kentucky; that appellant agreed to sell and deliver the crop of wheat grown by him upon his lands, in this state, during the year 1915, to appellee or to its agent, on board the cars at Hickman, Ky., within a reasonable time after same should be threshed, not later than the 10th day of August, and appellee, or its agent, was at the time of such delivery and at the place of delivery and concurrent therewith to pay to appellant the contract price for the wheat, which was $1.04 per bushel. The appellant testified that Creed did not represent to him that he was making the contract for or on behalf of appellee, and the testimony of Creed fails to show that he disclosed his principal, although he makes the statement that appellant knew in what capacity he was contracting. This difference, however, is not important. The evidence does not disclose that the contract contained any stipulation that the wheat was to be consigned to any one or to any place by appellant when put on board the cars, and hence it must be assumed that the appellee, when the wheat was delivered, might consign it to such person or to such destination or to do with it, as it saw fit."

The Kentucky Supreme Court then applied the following analysis to the facts:

"An analysis of the terms of the contract shows that the wheat was purchased in Kentucky, to be delivered and paid for in Kentucky, and at a time when the wheat and all parties were in Kentucky. The title to the property, under the contract, was to pass from the vendor to the vendee in Kentucky. No further thing

was to occur or to be performed beyond the boundary line of the state of Kentucky to make a complete compliance with the contract, nor had any negotiations been theretofore carried on with reference to the contract between the appellant and appellee whilst the latter was in the state of Tennessee. The wheat was not to be consigned for delivery to any point or to any person outside of the state, so far as the terms of the contract require. The appellee, when it should have received and paid for the what in this state, might resell it in this state, or ship it to such point as it desired, or otherwise dispose of it in the state, according to its pleasure. There was nothing in the terms of the contract, which required the consignment or shipment of the wheat from Kentucky to another state in order to make a full compliance with it.

"How can this contract be distinguished from one entered into in this state, between citizens of this state, for the sale and delivery of a product then in this state? The only distinguishing feature would be that one of the parties was a citizen of a state other than the state of Kentucky. Such a fact, however, could not convert a transaction into a transaction in interstate commerce which was not otherwise an interstate transaction.

* * *

"Having arrived at the conlcusion that the contract sued on was one which had relation to doing business in the state of Kentucky, and not a transaction in interstate commerce, and it appearing that the appellee had never complied with the requirement of section 571, supra, which was a condition precedent to its right to do business within this state, the contract was unlawful, and the court should not have given its assistance to a recovery for a breach of it, but should have sustained

the motion for a directed verdict. With this view of the case, it is unnecessary to consider any other questions raised on the appeal."

In the instant case, the Mississippi Supreme Court. applied the same analysis and reached the same conclusions as had the Kentucky court in 1917 (Opinion of the Mississippi Supreme Court, *Jurisdictional Statement*, p. A. 4-A. 6):

"It is apparent that these transactions of Allenberg in each case, including that with Pittman, took place wholly in Mississippi. The contract was negotiated in Mississippi, executed in Mississippi, the cotton was produced in Mississippi, delivered to Allenberg at the warehouse in Mississippi, and payment was made to the producer in Mississippi. All interest of the producer in the cotton terminated finally upon delivery to Allenberg at the warehouse in Marks. The fact that afterward Allenberg might or might not sell the cotton in interstate commerce is irrelevant to the issue here, as the Mississippi transaction had been completed and the cotton then belonged exclusively to Allenberg, to be disposed of as it saw fit, at its sole election and discretion.

* * *

"The affixation of Allenberg's signature in Memphis to a contract form before it was sent or brought to Marks for execution by the producer in nowise made it a contract prior to its acceptance and execution by the producer at Marks. Nor is the transaction converted into interstate commerce because, after the cotton had been delivered to Allenberg at the warehouse in Marks and title thereto had become vested in Allenberg in Mississippi, Allenberg, at its own election and for its own purposes. might afterward sell it in interstate commerce."

On appeal, of the Kentucky case in 1921, the United State Supreme Court established and applied the following rule of constitutional law (*Dahnke*, at 291-292):

"[After reciting the principle with regard to sales.] On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation. This has been recognized in many decisions construing the commerce clause. *** Buying and selling and the transportation incident thereto constitute commerce." In *United States v. E. K. Knight Co.*, 156 U.S. 1, 'contracts to buy, sell, or exchange goods to be transported among the several states' were declared 'part of interstate trade or commerce.' And in *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, the court referred to the prior decisions as establishing that 'interstate commerce consists of intercourse and traffic' between the citizens or inhabitants of different states, and includes not only the transportation of persons and property ... but also the purchase, sale and exchange of commodities. *** A corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause. [Citing, inter alia, *Crutcher v. Kentucky*, 141 U.S. 47; *Western Union Tel. Co. v. Kansas*, 216 U.S. 1.]

The principle, that a purchase or sale for shipment is interstate commerce, which was enunciated in *Dahnke*, was the central principle of the following cases decided prior to *Dahnke*: *International Text Book Co. v. Pigg*, 217 U.S. 91 (1910); *Sioux Remedy Co. v. Cope*, 235 U.S.

197 (1914); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899); *Swift & Co. v. United States*, 196 U.S. 365 (1905); *Robbins v. Shelby County Taxing District*, 120 U.S. 489 (1887).

This principle is also the central principle of the following cases, decided subsequent to *Dahnke*: *Lemke v. Farmer's Grain Co.*, 258 U.S. 51 (1922); *Stafford v. Wallace*, 258 U.S. 495 (1922); *Shafer v. Farmer's Grain Company*, 268 U.S. 187 (1925); *Flanagan v. Federal Coal Company*, 267 U.S. 222 (1925); *Mandeville Island Farms v. American Crystal Sugar Company*, 334 U.S. 219 (1947); *Furst v. Brewster*, 282 U.S. 493 (1921); *United States v. Rock Royal Co-op*, 307 U.S 533 (1939); *H. P. Hood & Sons v. DuMond*, 336 U S. 525 (1949); *Bruhn's Freezer Meats v. USDA*, 438 F.2d 1332 (8th Cir. 1971).

That principle is incorporated in statutory as well as case law. See, e.g. 7 U.S.C. §§ 1, 3 (Commodity Exchange Act, discussed below in this brief); and 7 U.S.C. § 183 (Packers and Stockyards Act).

The Appellee seeks to distinguish *Dahnke* in six ways (*Motion to Dismiss or Affirm*, p. 14).

(1) He contended that the contract in *Dahnke* specified delivery outside of Kentucky.

This is not correct. Both the Kentucky Supreme Court and the United States Supreme Court expressly found that the contract called for delivery in Kentucky (*Dahnke*, at 286; *Dahnke-State Opinion*, 195 SW at 140). After filing the *Motion to Dismiss or Affirm* the Appellee telegraphed the Clerk to omit this contention.

(2) and (6) In *Dahnke* the contract called for delivery f.o.b. cars, whereas in the instant case delivery was to be accomplished by delivery of negotiable warehouse re-

ceipts representing the cotton which had been stored by the farmer. This is essentially the same contention as his point (6), in which the Appellee points out that in *Dahnke* the grain which was the subject of the contract was not warehoused before delivery whereas his cotton was.

This difference stems from a difference in the handling of the two commodities in the particular cases. Except in exceptional circumstances, cotton cannot be shipped as it comes from the fields. Each bale, even from the same farm, "is a different quality due to variations in soil, time of planting, harvesting, changes in weather, variety of cotton planted, and many other causes. A vital function then of cotton merchandisers is to assemble these odd-lot bales and pool them with other bales of like qualities [customarily of 100 bales] to meet the requirements of spinners [cotton mills] wherever they are." A. B. Cox, *Cotton - Supply, Demand & Merchandising*, p. 4 (quoted in Statement of the Case at ftn. 4). Grouping is done by the cotton merchant's employees in its central office. The merchant then issues shipping orders to the warehouse, directing the warehouse which 100 bales to load on cars to be shipped to a given mill. *Cotton - Demand, Supply & Merchandising*, quoted at ftns. 7-8, Statement of the Case. This sorting and grouping function is essential because each cotton mill has designed its machinery to handle a specific grade and quality of cotton. *Cotton - Demand, Supply & Merchandising*, quoted at ftns. 5-6, Statement of the Case.

The cotton farmer warehouses the cotton, and delivers negotiable receipts to obtain payment. Assuming that owning cotton in warehouses during the period of time necessary to group it into shipping lots is "intrastate," this "intrastate" aspect cannot be separated from the interstate sale and purchase. It is common to virtually

all sales of cotton by Mississippians to persons outside the state. If the out of state merchant discontinued this practice, it would also be required to withdraw from the interstate business. It is not economically feasible to ship cotton from Mississippi before it is sorted in a warehouse, because its destination cannot be determined until it is grouped into even running lots. An otherwise interstate transaction will not be deemed to be intrastate in character because of intrastate aspects which are essential to the interstate transaction and which cannot be separated from it. *Cooney v. Mountain States Tel. & Tel. Co.*, 294 U.S. 384 (1935); *Sprout v. South Bend*, 277 U.S. 163 (1928); *LeLoup v. Port of Mobile*, 127 U.S. 640 (1884); *Eli Lilly & Co. v. Sav-On-Drugs*, 366 U.S. 276 (1961).

The argument propounded by Appellee was rejected in *Chicago Board of Trade v. Olson*, 262 U.S. 1 (1923). These transactions on the floor of the Chicago Board of Trade were held interstate commerce, despite the argument that the subject of the sales was wheat which was not moving, but was held in designated warehouses.

It would certainly be anomalous to determine that sales of cotton in public warehouses are not interstate commerce. Cotton is one of the nation's largest and most important crops. It must be warehoused and grouped before it is useful to consuming mills. If it is held that the warehousing aspect of the transaction makes the matter intrastate, then almost every sale of cotton in the United States is intrastate.

(3) In *Dahnke*, Appellee asserts that the out of state mill had established a practice of buying in Kentucky; whereas the Allenberg-Pittman contract was a "first arrangement." To the extent it is relevant, this point benefits Allenberg since it indicates Allenberg was more removed from the seller than the buyer in the *Dahnke* case.

However, the relevant point is that in *Dahnke* the purchase was not an isolated transaction, since the buyer bought large amounts of wheat in Kentucky in the year of the contract as well as in prior years.

Appellee also states in (3) that Covington, the local cotton broker, "did not know what would happen to the cotton." Covington's testimony meant he did not know to which states or foreign countries the cotton was going. He did not know that it would go somewhere—he testified: "Well, its shipped to foreign countries, different mills. Wherever they want to sell it. Lots of it in Marks [Mississippi] went to Japan." A. 60.

(4) Appellee asserts that in *Dahnke* the selling farmer knew the wheat was leaving the state, whereas Pittman had "no knowledge." To the contrary, the records show the reverse is true. In *Dahnke* the Kentucky Supreme Court found that: "The [farmer] testified that Creed [the local wheat buyer] did not represent to him that he was making the contract for or on behalf of [the out of state buyer], and the testimony of Creed fails to show that he disclosed his principal." *Dahnke-State Opinion*, p. 140. The opinion in the United States Supreme Court does not mention the farmer's knowledge, or lack of it.

In the instant case the contract shows on its face: "Buyer: Allenberg Cotton Company, 104 S. Front Street, P. O. Box 254, Memphis, Tennessee." (A. 5) The broker, Covington, testified that by telephone he relayed Pittman's offer to sell at 22¢ per pound to Allenberg's office in Memphis, and that after negotiations over the telephone, a price was agreed upon, through him, between Pittman and Allenberg (A. 103). Pittman never denied knowledge of the identity of the party with whom he was contracting. To the contrary, he testified Covington called him to tell him Jerry Hill (of the Allenberg Memphis office)

had delivered the contract documents to Covington's office (A. 83). He also never denied knowing that the cotton would be shipped from the state (A. 82-A. 86).

(5) Appellee contends that in *Dahnke* there was "transportation involved," but it was "not involved" in the instant case.

On the record in *Dahnke*, the transportation there involved was only that contemplated by the buyer. The seller contended, and the Court accepted his contention, that as far as he was aware, the sale was only between himself and Creed, who was also a local resident.

In the instant case Pittman knew he was selling to a foreign corporation and did not deny knowledge of its destination out of state. Of course, under *Dahnke*, his knowledge or lack of it is irrelevant; the record on this point in *Dahnke* establishes only that the buyer intended to ship the wheat out of state, and no more. ("The wheat was not to be consigned for delivery to any point or to any person outside of the state, so far as the terms of the contract require." *Dahnke-State Opinion*, at 140). In the instant case, Allenberg also bought the cotton to ship it out of state. (A. 78, A. 79, A. 96). In fact, virtually every bale of cotton produced in Mississippi leaves the state because there is no significant milling activity in that state. See ftn. 3, Statement of the Case; and *Allenberg Cotton Company, Inc, v. Coleman*, 369 F. Supp. 426, reprinted in Supplemental Brief of Appellant Containing New Case Authority, p. 17a. Thus the relevant facts in the instant case and in *Dahnke* are identical. In each case the buyer intended to ship the commodity out of the state. The additional circumstance, that the seller here knew he was selling to an out of state company, makes the present case even stronger than *Dahnke*.

The foregoing shows *Dahnke* and the instant case to be on all fours in every relevant particular.

Dahnke, however, is more than a particular decision on a given state of facts. It is a key principle. It is a part of a series of judicial and legislative decisions protecting free access to the agricultural products of the nation. In this it is a central principle in the framework of commercial relations and legal decisions by which is established the federal free trade unit intended by the authors of the Constitution.

Central to the vision of the founding fathers was the creation of a national market for commodities. Hamilton expressed the idea in the Federalist, No. 11, at 52:

"FREEDOM OF INTERSTATE COMMERCE FAVORABLE TO ALL STATES

> "An unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished, and will acquire additional motion and vigor from a free circulation of the commodities of every part. Commercial enterprise will have much greater scope, from the diversity in the productions of different States. When the staple of one fails from a bad harvest or unproductive crop, it can call to its aid the staple of another. *** The speculative trader will at once perceive the force of these observations, and will acknowledge that the aggregate balance of the commerce of the United States would bid fair to be much more favorable than that of the thirteen States without union or with partial unions."

In *Shafer v. Farmer's Grain Company*, wheat was purchased in North Dakota at some 2,200 country grain elevators

by North Dakota buyers who were agents of the owners or operators of the elevators. Both buyers and sellers were located in the state. The contracts were made and performed wholly in the state. The sale of the wheat was complete upon delivery at the grain elevator. It was then held there by the buyers until carload lots were assembled. 90% of the wheat was purchased with the intent to resell and ship to markets outside the state.

A North Dakota statute imposed licensing and other requirements on the grain buyers, but the Court struck down the statute as inimicable to the Commerce Clause, saying, "Buying for shipment, and shipping, to markets in other state, when conducted as before shown, constitutes interstate commerce,—the buying being as much a part of it as the shipping. We so held in *Lemke v. Farmer's Grain Co.*, 258 U.S. 50, following and applying the principle of prior cases. Later cases have given effect to the same principle. *Stafford v. Wallace*, 258 U.S. 495.

"Wheat ... is a legitimate article of commerce and the subject of dealings that are nationwide. The right to buy it for shipment, in interstate commerce, is not a privilege derived from state laws, and which they may fetter with conditions, but is a common right ..." *Shafer*, at 198-99.

In their central aspects, these leading cases from an earlier day, *Dahnke*, *Lemke*, *Shafer*, *Robbins*, *Stafford*, and others, consistently espouse the overriding goal of protecting and fostering a national common market in commodities. Although no one could gainsay that judicial philosophy and approach have changed since their time, in this basic aspect these decisions form a consistent link between the authors of the Constitution, and the authors of more recent Commerce Clause decisions, particularly those since the great depression. The history of these ideas was reviewed by Mr. Justice Jackson in 1949 in *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949).

In *Hood* the State of New York had denied a license to H. P. Hood & Sons, Inc., to establish a milk receiving depot in New York. Hood was a milk distributor, located in Boston and incorporated in Massachusetts. The State of New York asserted significant local interest in preventing further competition in the particular milk marketing area involved. Despite the admitted importance of the state interest asserted (the Court found that production and distribution of milk were intimately related to public health and welfare, and that the eccentric economy of the industry required economic controls), the Court did not allow the statute to stand. The opinion of the Court reflects the historic concern for the protection of the national free trade area:

> "When victory relieved the Colonies from the pressure for solidarity that war had exerted, a drift toward anarchy and commercial warfare between states began. '. . . each state would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view.' This came 'to threaten at once the peace and safety of the Union.' Story, The Constitution, §§ 259, 260. See Fiske, The Critical Period of American History, 144; Warren, The Making of the Constitution, 567. The sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was 'to take into consideration the trade of the United States; to examine the relative situations and trade of the said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony' and for that purpose the General Assembly of Virginia in January of 1786 named commissioners and proposed their meeting with those from other states. Documents, Formation

of the Union, H.R. Doc. No. 398, 12 H. Doc., 69th Cong., 1st Sess., p. 38.

"The desire of the Forefathers to federalize regulations of foreign and interstate commerce stands in sharp contrast to their jealous preservation of the state's power over its internal affairs. No other federal power was so universally assumed to be necessary, no other state power was so readily relinquished ... ***

"[The] principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units... ***

"The material success that has come to inhabitants of the states which make up this federal free trade unit has been the most impressive in the history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movements of goods against local burdens and repressions. We need only consider the consequences if each of the few states that produce copper, lead, high-grade iron ore, timber, cotton, oil or gas should decree that industries located in that state shall have priority. What fantastic rivalries and dislocations and reprisals would ensue if such practices were begun?

* * *

"Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign

state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality."

The continuity of thought running throughout the Constituion, the early cases and the post-depression cases, had been the subject of other commentary:

"The Constitution empowers Congress to regulate "commerce among the several states." * * * The early cases and a great number of later ones had held that the Commerce Clause barred the states from enacting laws which intruded too far into the interstate domain. In the very first of these cases - and indeed the first case under the Commerce Clause - Chief Justice Marshall had 'described the federal commerce power with a breadth never yet exceeded.' *Wickard v. Fillburn*, 317 U.S. 111, 120 (1942). His opinion in *Gibbons v. Ogden*, 9 Wheat 1, in 1824, had delcared that the Commerce Clause comprehended 'that commerce, which concerns more states than one...'

"This sweeping interpretation of the clause as reaching all commercial matters affecting the states generally, by a judge who had lived through the period when the Constitution was adopted and even taken some part in that process, finds support both in the usage of language during that period, and in the proceedings in the Constitutional Convention. * * *

"[Although some cases took a restrictive view of Commerce Clause powers] in the great majority of cases decided during the same general period, 1900-1930, the Court was upholding the application of the commerce power even to intrastate transactions. * * *

"The Grain Futures Act, upheld in *Chicago Board of Trade v. Olsen*, 262 U.S. 1 (1923), regulated trading on the grain exchanges, most of which consisted of sales of futures not actually to be delivered and accordingly involving no interstate commerce, although they controlled the price of grain throughout the country. But the Court 'refused to permit local incidents of great interstate movement, which taken alone were intrastate, to characterize the movement as such.'

* * *

"The depression had hit farmers as hard as workers and businessmen. Even before 1929 a maladjustment between the demand for and supply of basic agricultural products and resulting low prices to the farmers had prevented farmers from sharing in the temporary prosperity of that period. With the depression, farm prices collapsed to an even greater extent than prices generally. This was of particular significance insofar as it related to the prices of commodities farmers buy. Farm prices dropped so rapidly that by the spring of 1933 the average purchasing power of the farmer in relation to such commodities had decreased 50 percent. The curtailment in domestic demand as a result of a drastic decline in agricultural export had not been accompanied by any equivalent diminution in supply, since the individual farmer would lose by reduction of his crops unless the vast majority of his fellows limited production to the same extent. The problem was obviously unsolvable by state or local action; the crops were produced in many states and competed with each other in national and international markets.

[Early depression farm legislation, relying on the taxing power, was struck down as violative of the Tenth Amendment in *United States v. Butler*, 279 U.S. 1 (1936).]

"The marketing order provisions of the Agricultural Adjustment Act, as improved in 1935, did not fall within the *Butler* case. They permitted the establishment of minimum prices for milk in interstate milk sheds, and a limitation upon the quantity marketed of fruits, vegetables and some miscellaneous commodities. *** The first cases to reach the Supreme Court were suits brought by the United States to compel compliance with the orders in the Boston and New York milk marketing areas. *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939); *H. P. Hood & Sons v. United States*, 307 U.S. 588 (1939). ***

"The prices regulated were those in sales by dairy farmers to dealers who received the milk in neighboring country plants and then transported it to market. It was argued that these sales were 'fully completed before any interstate commerce begins.' [*Rock Royal*, at 568.] But the Court, speaking through Mr. Justice Reed, reaffirmed the holding of [*Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921); and *Lemke v. Farmer's Grain Co.*, 258 U.S. 50 (1922)] that 'where commodities are bought for use beyond state lines, the sale is a part of interstate commerce.' [*Rock Royal*, at 568-69]. Stern, *The Commerce Clause & the National Economy*, 1933-1946, 59 Harv. L. Rev. 645-688 (1946).

Thus the interpretation of the scope of "interstate commerce", established in *Dahnke* and *Lemke*, was reaffirmed by the Court in this crucial depression case, as well as in other critical decision of that period. See *Currins v. Wallace*, 306 U.S. 1 (1939) (upholding federal regulation of purchases of tobacco in North Carolina warehouses citing *Dahnke*, *Lemke*, *Swift*, *Stafford*, *Flanagan*, *and Shafer*).

The Commerce Clause has two facets: affirmatively, it authorizes national legislation; and negatively, it limits certain state actions found inimicable or burdensome to the workings of the federal free trade unit.

> "What Marshall merely adumbrated in *Gibbons v. Ogden* became central to our whole constitutional scheme: the doctrine that the Commerce Clause, by its own force and without national legislation, puts into the power of the Court to place limits upon state authority. *** Marshall's use of the Commerce Clause greatly furthered the idea that though we are a federation of states we are also a nation, and gave momentum to the doctrine that state authority must be subject to such limitations as the Court finds it necessary to apply for the protection of the national community." Frankfurter, *The Commerce Clause Under Marshall*, Tainey & White, 12-29 (1937).

The negative implications of the Commerce Clause are not to be applied in any absolute way. Automatic application of formulas has long been rejected in favor of a frank assessment of the competing needs of the federal free trade unit, and the needs of the state to exercise its authority over the particular subject in question. *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959). However, at least since the depression cases, it has been recognized that where Congress has spoken, it has ultimate power to redefine the scope of the Commerce Clause. *Southern Pacific*; *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946); *State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451 (1962).

> "For a hundred years it has been accepted constitutional doctrine that the Commerce Clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the Commerce Clause the final arbiter of the competing demands of state and national interests. *Cooley v. Board of Wardens.*
>
> "*Congress has undoubted power to redefine the distribution of power over interstate commerce.* ***
>
> "But in general congress has left it to the courts to formulate the rules thus interpreting the Commerce Clause in its application, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn ... Meanwhile, Congress has accommodated its legislation, as have the states, to these rules as an established feature of our constitutional system." *Southern Pacific*, at 770. (emphasis added).

In the instant case Congress, and the great majority of states, have accommodated their legislation to well established definitions of the scope of interstate commerce. The states have done so in the Model Business Corporation Act and similar laws. The "interstate commerce" exemption incorporated therein is intended to conform the Model Act to the definitions of "interstate commerce" propounded in *International Text Book Co. v. Pigg*, 217 U.S. 91 (1909); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921); *Union Brokerage v. Jensen*, 322 U.S. 202 (1944); and *Eli Lilly & Company v. Sav-On-Drugs, Inc.*, 366 U.S. 276 (1960). Model Business Corporation Act Annotated (2nd Ed. 1971) § 106 2d Par., ¶ 4.05. The definition of interstate commerce established in those cases is the definition relied upon by Allenberg in this appeal.

More to the point, however, is the fact that Congress has exercised its power to define interstate commerce,

and has provided, by legislative statement, definitions of interstate commerce applicable to the transactions in cotton which are the subject of this suit. The definitions provided by Congress are entirely the same as those established in the seminal cases:

> *Dahnke*; *Lemke*; *Pigg*; *Shafer*; *Flanagan*; *Swift & Co.*, and *Stafford*.

These same definitions were later approved in the post depression cases: *Rock Royal*; *H. P. Hood v. U. S.*; and *Currin* cases which also recognized the authority of Congress in defining the scope of the Commerce Clause.

The Commodity Exchange Act, 7 U.S.C. ¶1, et seq. (which, inter alia, established the legislative foundation for the New York Cotton Exchange which is used by Allenberg Cotton Company, Inc., to hedge purchases of cotton from farmers like Appellee) provides, at § 3: "For the purposes of this Act (but not in any wise limiting the foregoing definition [in section 2] of interstate commerce) a transaction in respect to any article [e.g. cotton] shall be considered to be in interstate commerce if such article is part of that current of commerce *usual in the commodities trade* whereby commodities and commodity products and by-products thereof are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description [in Section 2], *all cases where purchase* or sale *is* either *for shipment to another State*, or for manufacture within the State and the shipment outside the State of the products resulting from the manufacture."

This definition should be given great weight in the circumstances of this case. For a commodity merchant, operating its business by hedging on the New York Cotton Exchange, or on the Chicago Board of Trade, both the purchase and the hedging of commodities are interdependent parts of a whole. If either the cash purchase (from the farmer) or the hedge (of "futures" on the exchange) is not valid, the economic function of the two complementary transactions will be entirely defeated. A narrow viewpoint of either side of the transaction, a viewpoint which fails to recognize that both must be valid for the crucial economic function of the "hedge" to survive, is inimicable to the interests of the national free trade unit. Such a viewpoint would strike a mortal blow to the foundations of the nation's commodity marketing system. In 1923 in *Chicago Board of Trade*, the Court was presented with such a viewpoint and resoundingly rejected it.

In *Chicago Board of Trade*, the Grain Futures Act (the precursor of the Commodity Exchange Act) was challenged as exceeding the power of Congress in that it purported to regulate the making of contracts for the purchase and sale of grain for future delivery. The contracts were made and performed wholly in Chicago and were usually settled by offsetting contracts on the exchange, not involving actual delivery. The grain which was the subject of the transactions was not moving, but was stored in public warehouses. Viewed narrowly, those contracts were merely local transactions. However, the Court refused to ignore the actual economic role of the contracts made on the floor of the exchange. It recognized contracts for *future* delivery as a fit subject for the exercise of power under the Commerce Clause, citing as authority *Stafford*, a case upholding the power of Congress to regulate *cash sales* of agricultural commodities. The Court quoted that well known passage of *Stafford*, upholding the Packers and Stockyards Act:

> "The stockyards are but a throat through which the current of commerce flows and the transactions which

occur therein are only incident to this current from the west to the east and from one state to another ... The sales are not, in this aspect, merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but on the contrary, being indispensible to its continuity."

This reasoning applies equally here. The sale by the Mississippi farmer is indispensible to commerce in cotton. Its otherwise local aspects are overshadowed by its critical significance as the initiation of interstate commerce in cotton. Relying upon the validity of the contract, the purchaser of the cotton, in the normal course of events, hedges the purchase by an offsetting sale of cotton on the New York Cotton Exchange (see the explanation of this practice in the Statement of the Case at ftns. 9-13) or by offsetting sales made directly with a cotton mill. In both cases the "hedges" established are protected from invalidity by the Commodity Exchange Act §6c (which prohibits entering into, or confirming such sales if they are fictitious. 7 U.S.C. §6c). They are protected by federal law because practice of "hedging" is vital to the nation's economy. The Commodity Exchange Act was a fit subject for the exercise of power under the Commerce Clause because of the vital economic function performed by the national agricultural marketing system.

An enforceable contract between the farmer and an out of state commodity merchant is no less vital to the marketing of the nation's agricultural products. In the eyes of the commodity merchant the validity of the contract with the farmer is fully as important as the validity of the offsetting contract on the commodity exchange. The Congressional definition expresses the understanding of the

trade of a doctrine established at least at the beginning of this century, if not sooner, that a purchase of cotton (or other commodity) for shipment from the state is a purchase in interstate commerce. *Dahnke*, *Lemke*, *Stafford*, *Swift*, *Shafer*, *Flanagan*.

Allenberg does not argue here that such a purchase contract is absolutely immune from state regulation or taxation. It argues only that such a contract may not be ***invalidated*** by a state because it is made without local corporate qualification.

Where local qualification was not accomplished because of reliance upon well established definitions of interstate commerce, definitions established judicially and subsequently incorporated into legislative programs central to the agricultural marketing system, those definitions cannot be abandoned by the State of Mississippi without conflicting with the national marketing system which has been fostered, protected, and established under the Commerce Clause, as interpreted by Congress in the Commodity Exchange Act, and by this Court in its past decisions.

Further evidence of the characterization of such transactions by Congress is given by the recent declaration of policy in the Cotton Research & Promotion Act, 7 U.S.C. §2101 (emphasis added):

"Section 2101. Legislative findings and declaration of policy. — Cotton is the basic natural fiber of the Nation. It is produced by many individual cottongrowers throughout the various cotton-producing States of the Nation. ***Cotton moves in large part in the channels of interstate and foreign commerce and such cotton which does not move in such channels directly burdens or affects interstate commerce in cotton and cotton products. All cotton produced in the United States is in the current***

> *of interstate or foreign commerce or directly burdens, obstructs, or affects interstate or foreign commerce in cotton and cotton products.* The efficient production of cotton and *the maintenance and expansion of existing markets* and the development of new or improved markets and uses *is vital to the welfare of cottongrowers and those concerned with marketing, using, and processing cotton as well as the general economy of the Nation.*"

These statements of Congress reflect the realities of the cotton industry. They are entitled to great, if not controlling, weight. *State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451 (1962).

As to the deference which should be given Congressional definition of the scope of the Commerce Clause *Prudential Insurance v. Benjamin*, 328 U.S. 408 (1946), is instructive. Prior to the decision of *United States v. South-Eastern Underwriters*, 322 U.S. 533 (1944), the Supreme Court had given broad scope to state regulation of the insurance business by a series of cases holding that the insurance business was not "interstate commerce." In *South-Eastern Underwriters*, the Court held that the modern business of insurance was "interstate commerce," and therefore in a category which Congress could regulate, and which could not in some respects be regulated by the states.

After the decision in *South-Eastern Underwriters*, Congress passed the McCannon-Fergeson Act, 59 Stat. 33, 15 U.S.C. § 1011, which stated a congressional policy that regulation and taxation of insurance should be left to the states.

Thereafter, in *Prudential Insurance*, Prudential challenged, on Commerce Clause grounds, the imposition of a South Carolina tax on premiums received from South Carolina residents. The Court sustained the state's power to

tax in an opinion which leaves no doubt of the authority of Congress to establish the contours of the Commerce Clause. The relevant doctrine of that case was more recently restated by Mr. Justice Douglas in *State Board of Insurance*, at 456:

> "The power of Congress to grant protection to interstate commerce against state regulation or taxation, or to withhold it, is so complete that its ideas on policy should prevail."

Where subsequent legislation and industry practice have relied upon the continuing validity of prior decisions, and incorporated their definitions of interstate commerce, the Court should be loath to change them. In such cases the Court need not decide, de novo, whether its prior rules are sound. *State Board of Insurance; Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Flood v. Kuhn*, 407 U.S. 258 (1972).

In *Flood* the Court listed four reasons for refusing to disturb older precedents of *Toolson* and *Federal Baseball*, 259 U.S. 200 (1922), especially where economic and business relationships had undoubtedly been established on the assumption that the prior decisions would have continuing validity: 1) Congressional awareness for three decades of the Court's prior ruling; 2) the fact the trade relationships were established upon the understanding that the prior decisions would have continuing validity; 3) the negative consequences which would be produced by the retroactive effect of judicial change of the law; 4) a desire that any needed remedy be provided by legislation rather than by court decree. The Court concluded: "We continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson*, to overturn those cases judicially when Congress by its positive inaction, has allowed those decisions to stand so long and, far beyond

mere inference and implication, has clearly evinced a desire not to disapprove them legislatively." *Flood*, at 283-84.

The same conclusion reached in *Flood* from the application of these four considerations should be reached in this case.

1) Congress has been aware since long before *Dahnke* in 1921, of the general understanding that purchases of commodities made for shipment out of state were deemed "interstate commerce" with the concommitant result that such transactions may not be regulated in some respects by the states. It has incorporated that understanding in the definitions contained in its own legislation. At least since 1921 it has been aware that one limitation on state power over such transactions is that the states will not be allowed to refuse to enforce such contracts in their courts.

2) Commodity merchants, such as Allenberg, have established trade relationships on the assumption that these definitions of interstate commerce, and the concommitant limitation on state power would have continuing validity; i.e. commodity merchants have assumed that they could buy agricultural commodities for interstate shipment without first qualifying to do business in each state in which they buy. They have assumed that the contracts established in such transactions will be enforceable, and they have entered into and hedged many millions of dollars worth of contracts on that assumption.

3) The negative consequences which would stem from the retroactive effect of a judicial change in the law is nowhere better illustrated than in the Mississippi experience of the cotton industry. Over one million bales of cotton in Mississippi were under forward contract in 1973. The decision of the Mississippi Supreme Court in the

instant case was followed by the repudiation of great numbers of these contracts, and the filing of scores of lawsuits in the United States District Courts of Mississippi. The price of cotton in the spring of 1973, when most forward contracts were made, was about $.30 per pound. The decision in the instant case was rendered in May, 1973. By September, 1973 the price had climed to $.85 per pound, and it remained at extremely high levels until March, 1974, after reaching peak levels of over $.90 per pound in December, 1973.

Many cotton merchants who were not qualified to do business in Mississippi were caught in a terrible trap by this decision. The prices they agreed to pay in forward contracts in the spring were based on the prices at which they could then sell that cotton. They had no way of knowing that the price would go up. (If anyone had had this foresight he could have taken a speculative position on the New York Cotton Exchange and "made a killing." He did not need to merchandise cotton). Because they did not know in the spring whether the price of cotton would go up or down they "hedged" the forward contracts by making sales of futures on the New York Cotton Exchange. If the price went down they could buy back the sale of futures (close their futures position) at a profit which would be roughly equal to the amount lost because the price of the cash commodity purchased had declined. However, the price went up. If a merchant had sold futures at $.35 per pound it had to buy back those futures at $.85 per pound, incurring an enormous loss. But if it could not enforce its contract for the cash commodity in Mississippi the merchant had no way to recover the money lost.

This was true whether the New York Cotton Exchange was used as a hedge, or a hedge was established by sales to cotton mills. If the merchant made a forward purchase

contract for $.30, and hedged it by a resale at $.35 to a cotton mill, it was theoretically protected from any price change. It was "out of the market." If the price went up or down it was protected, because it had locked in a margin of $.05 to cover costs and expected profit. But when the Mississippi Supreme Court held that it could not enforce its contracts with the farmer, it faced disaster. In order to deliver on its $.35 contract with the mill it had to buy cotton at $.85. If it defaulted in its contract with the mill it was liable for the same amount because the mill would purchase replacement cotton at $.85 and sue it for the difference between that cost and the contract price.

In fact, as a result of farmer defaults in forward contracts in 1973 many cotton merchants suffered enormous losses. Some were rendered insolvent. Those merchants which had placed heavy reliance on Mississippi forward contracts survived in large part because of the action of the United States District Court for the Northern District of Mississippi. Prior to that Court's decision great numbers of farmers had repudiated forward contracts. In one farming area alone, in September, 1973, farmers repudiated 30 contracts with a single out of state corporation for over 7,000 acres of cotton, expected to produce over 7,000 bales (representing a potential loss of $1,750,000.00). If the United States District Court had ratified the decision of the Mississippi Supreme Court in the instant case, the certain result would have been chaos in the industry and enormous hardship for many cotton merchants and mills who had relied upon the previous state of the law.

Cotton deliveries in Mississippi during the 1973-74 harvest were later than expected in many areas. This may have been due in part to weather, as many farmers claimed, but another reason was a desire to wait and see what the

decision of the United States District Court would be in the first cases raising the qualification issue. That decision was handed down on January 10, 1974 in the companion cases of *Cone Mills Corporation v. Hurdle, et al* and *Allenberg Cotton Company, Inc. v. Coleman*, 369 F. Supp. 426, reprinted in Supplemental Brief of Appellant Containing New Case Authority, p. A. 1 et seq. In those cases preliminary mandatory injunctions were granted ordering the delivery of cotton under forward contracts. Since then the *Allenberg v. Coleman* case has been settled. The case of *Cone Mills Corporation v. Hurdle* still pends, awaiting trial on a docket crowded with other cotton cases.

Few cases demonstrate so vividly the inter-relationship of legal opinion and economic effect, or illustrate so forcefully the soundness of the proposition that the law of "commerce among the States is not a technical legal conception, but [must be] a practical one, drawn from the course of business." *Swift & Co. v. United States*, 196 U.S. 375 (1905), Holmes, J., quoted in *Allenberg Cotton Company, Inc. v. Coleman*, 359 F. Supp. 426, and in *Wickard v. Fillburn*, 317 U.S. 111 (1942).

The negative consequences of the retroactive effect of the Mississippi Supreme Court's decision in this case have been postponed by the subsequent decision of the United States District Court for the Northern District of Mississippi. However, many of the cases in which deliveries were made under preliminary mandatory injunction still pend trial or appeal. If this Court affirms the decision of the state supreme court, the severe consequences so far avoided will be incurred by many merchants and mills who relied on the promises of cotton farmers to perform their freely bargained contracts. These cotton merchants and mills are morally blameless, and, prior to the decision of this case, were legally blameless, too.

Aside from the Mississippi situation, if this Court should adopt the ruling of the state court as the supreme law of the land, it would risk creating hardship and severe economic dislocations on a national scale. Other commodities, such as wheat, are commonly purchased by forward contracts. *Small Business Problems Involved in the Marketing of Grain and Other Commodities*, Report of the Subcommittee on Special Small Business Problems of the Permanent Select Committee on Small Business, 93rd Cong., 2d Sess. (House Report No. 93-963, April 1, 1974) p. 7. Doubtless many wheat and grain merchants have entered these contracts without qualifying to do business in the seller's state, relying upon *Dahnke*, *Shafer*, and *Lemke*, all precedents established in the wheat industry. If, by judicial decision, these precedents are suddenly reversed, the adverse consequences suffered in Mississippi in 1973 may be duplicated in other industries in other states.

4) For these reasons the Court in *Flood* expressed its desire that any needed remedy be provided by legislation rather than by court decree. It is the job of the legislative branch to prepare studies and analyses of the consequences of a change in long established precedent. The Court can only speculate on those consequences. But even if this Court were equipped for such an inquiry, the legislative process would still be the proper route. The fact that legislative hearings were occurring and bills were being introduced, would give notice to the buyers of corn, chickens, pork bellies, rice, sugar, and all the various products of our land, that change was in the wind. Then steps could be taken to adjust to that change without the risk of violent economic disruption of established commercial practice.

For this reason this Court need not and should not decide de novo whether *Dahnke* should continue to be the law of the land.

II. B. RECONSIDERATION OF THE *DAHNKE* PRINCIPLE

The rule of *Dahnke*, *Sioux Remedy*, *Pigg*, *Crutcher*, and *Robbins* is that state license or qualification requirements may not be required to make purchases or sales for shipment in interstate commerce without running afoul of the Commerce Clause. The continuing validity of that rule was recently affirmed in *Eli Lilly* where, citing *Crutcher*, *Pigg*, and *Sioux Remedy*, the Supreme Court stated: "It is well established that [a state] cannot require [a foreign corporation] to get a certificate of authority to do business in the state if its participation in this trade is limited to its wholly interstate sales..." *Elu Lilly*, at 278.

But even if the *Dahnke* rule were considered de novo, it should be reaffirmed.

It has been recognized that in a case of this posture "the matters for ultimate determination here are the nature and extent of the burden which the state regulation ... imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make applicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the Commerce Clause from state interference." *Southern Pacific*, at 770-771.

The burdens imposed by the retroactive effect of a judicial reversal of *Dahnke* have already been discussed. But there are also prospective burdens imposed by the holding of the state court in the instant case.

It is a necessary effect of the rule now sought to be applied in Mississippi, that any foreign corporation which might seek to buy commodities in such a state must qualify

even before entering into a purchase contract. To fail to do so is to risk abrogation of the contract at any time after the "ink dries," without the protection of state enforcement of the obligation.

As a practical matter this will mean that potential competitors for the agricultural goods in the state's market must decide *prior to competing* whether to qualify in the given state or not. The anticompetitive effect of excluding potential competition from a given market has long been recognized by this Court. "Potential competition ... may restrain producers from overcharging those to whom they sell or underpaying those from whom they buy..." *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 173-174 (1964).

> "The biggest, most important service the cotton marketing system can render cotton growers is to make prices paid to farmers in local communities and regions true guides in direction of production. This means the varieties of cotton best suited to a region will and should sell at relatively the highest price, and other cottons, whether longer or shorter in staple, will sell at relatively lower prices." *Cotton — Demand, Supply & Merchandising*, p. 5-10 quoted at ftn. 16, Statement of the Case.

This service can only be performed if the market in a given state is fully open to all potential competitors, not just those who have previously entrenched themselves.

The national market for cotton which exists today is intensely competitive. 1968 U.S. Code Cong. & Admn. News 1869-70. It is made up of many small companies using modern communications and transportation to buy cotton in every producing state to resell it all over the world. No giants dominate the industry. The capital required, relative to the value of the commodity bought and

sold, is extremely low. About 500 small firms marketed between 70 and 80% of the nation's $2.75 billion cotton crop last year, more than half of which was sold abroad. See Statement of the Case at ftns. 17 and 31. Because these companies are small, administrative burdens are a very real factor in determining areas of competition. Today small companies located in the Carolina often purchase cotton in Arizona, Mississippi, Missouri, California, or other far away states in competition with firms in Dallas, Lubbock or elsewhere. They are drawn into the market in a given state by local brokers, such as Mr. Covington in the instant case. These local brokers know the farmers in their area, the varieties of cotton produced locally, and the potential buyers for that cotton. If prices offered by some firms in the local market get out of line, the local broker can raise the level of competition by contacting another firm with a telephone call. In this manner a firm which might not normally compete in Marks, Mississippi, might suddenly be drawn into that market.

However, if the ruling of the Mississippi Supreme Court is allowed to stand, no cotton merchant which has not previously qualified in Mississippi will even bid there. For if its bid is accepted and a contract made, it must instantaneously hedge that contract by offsetting sale to a mill or on the New York Cotton Exchange. Having thus put itself on the line, the merchant, under Mississippi law, will be completely at the farmer's mercy. If the market goes down, the farmer can enforce the contract against him. If the market goes up, the merchant cannot enforce the contract against the farmer.

It will result from this state of affairs that the firms already entrenched in Mississippi will qualify to do business there, and will bid for Mississippi cotton free from competition by others who might potentially be interested.

Mississippi will become a separate marketing area, a result completely at variance with the goal of the authors of the Constitution of a national common market.

If the Supreme Court adopts the rule promulgated by the State of Mississippi as the law of the land, similar results will be produced in other states in markets for other commodities.

The *Dahnke* rule is sound in another basic aspect. *Dahnke* states a rule which allows the buyer to judge the legal effect of its action from the nature of the transaction, not from its size. The *Dahnke* rule represents a great advance from a rule applied on a quantum basis. A quantum rule requires the buyer to guess when the size of its purchase or purchases may change its legal effect. A single contract might be made with a large farmer for the purchase of his production on 2,000 acres, estimated to produce 3,000 bales of cotton. At a price of 60¢ per pound the value of goods sold is $900,000.00. Is this intrastate business? On the other hand most cotton farms are very small. Another merchant might make 15 contracts to buy an aggregate of only 600 acres of cotton. Is this intrastate business?

The importance of continued adherence to well established rules, especially in a commercial setting, was recently reaffirmed by the Supreme Court in *Kosydar v. National Cash Register Co.*, 42 Law Week 4767 (1974). In *Kosydar* the court refused to depart from the basic principle of *Coe v. Errol*, 116 U.S. 517, and found it of great importance that "This Court has adhered to that principle in the almost 90 years since *Coe* was decided..." As Mr. Justice Stewart pointed out in the opinion, it is highly important that the parties involved be able to determine the legal effects of their actions through a clearly defined rule.

There are three alternative rules which might be proposed by Appellant-Pittman.

The first would interpret *Dahnke* to mean that a purchase of commodities is only "interstate commerce" where the contract calls for delivery on board a common carrier. If this rule is accepted, virtually no purchase of cotton would ever be interstate commerce. (See p. 71 of this Brief.) In fact, all purchases which are consummated by delivery of warehouse receipts would be intrastate commerce, thus excluding from interstate commerce contracts to purchase most of the nation's agricultural goods, e.g.: cotton, wool, corn, wheat, tobacco, flaxseed, etc. In addition to the other problems produced by such a rule, it would produce a result completely at variance with *Currin*, *Chicago Board of Trade*, *Shafer*, and with the United States Warehouse Act, 7 U.S.C. §241 et seq. See *Girand v. Kimbell Milling Co.*, 116 F.2d 999 (5th Cir. 1940).

The second possible rule is a quantum rule. It accepts *Dahnke*, but would apply the Constitutional exemption only to foreign corporations who had not done "too much" buying in the state. The adoption of such a rule would mean abandonment of a well established, clearly defined rule in favor of one which was completely ambiguous.

The third possible rule would be to abandon *Dahnke*, and require foreign corporations which wish to purchase commodities for shipment out of state to qualify. Such a rule would be absolutely at variance with the intent of the Constitution and the principles established in numerous decisions of the Court, would make each state a separate marketing area, would diminish competition for commodities, and its retroactive adoption by judicial decision would risk creating unforseen hardships for honest buyers and windfall profits for dishonest sellers.

Against the negative results of an abandonment of *Dahnke*, what interest of the state of Mississippi would be served? In *H.P. Hood & Son, Inc. v. DuMond*, the protection of the national free trade area was considered more important than the interest of the State of New York in regulating local production and distribution of milk, even though the Court found that the state regulation was intimately related to public health and welfare, and that the economy of the local industry required economic controls.

The interest of a state which is served by the prohibition of use of the courts by a foreign corporation is said to be the protection of the state's citizens from lack of redress in local courts against foreign corporations. Note, *Foreign Corporations - State Boundaries for National Business*, 59 Yale L. J. 737, 743 (1959): "The statutes attempt to insure availability of a person on whom valid process may be served, by requiring designation of an agent expressly authorized to receive it." However, in this respect the statute is superfluous because today every state provides for service of process under long-arm statutes. Note, *Foreign Corporations - State Boundaries for National Business*, id. at 738.

The Court has long recognized that a foreign corporation may be served with process in connection with activities which are insufficient to require it to qualify in the State. *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914).

The local defendant who is sued by a foreign corporation is, of course, not the person whom the qualification requirement is designed to protect. Yet the only party benefited by the statute is a wrongdoer who has repudiated his contractual promises when conditions have caused it to be to his selfish advantage to do so. Reliance on a foreign corporation's failure to qualify has been called an "immoral

defense." Whyte, *Business Associations*, 1938 Wis. L. Rev. 52, 54.

The Mississippi prohibition of a non-qualifying foreign corporation from the use of its courts was before the Supreme Court in *Woods*. In that case the Mississippi prohibition was held to apply in federal courts in diversity actions. In *Woods* the Court was unsure whether to interpret the Mississippi statutes in such a way as to prohibit entirely the use of all courts. However, the majority decided it should be so interpreted. In a ringing dissent, joined by Justices Rutledge and Burton, Mr. Justice Jackson stated his feelings about the character of the Mississippi law, as interpreted to bar all legal redress:

> "The state statute as now interpreted by this Court is a harsh, capricious and vindictive measure. It either refuses to entertain a cause of action...or it holds it invalid...In either case the amount of this punishment bears no relation to the amount of wrong done to the State in failure to qualify and pay its taxes. The penalty thus suffered does not go to the State, which sustained the injury, but results in unjust enrichment of the debtor, who has suffered no injury from the creditor's default in qualification..." *Woods*, at 534-40.

Other commentators have agreed with Mr. Justice Jackson:

> "Whatever its value as a punitive device, this penalty does not serve to rectify the harm done by non-registration. The state's interest in registration lies in the receipt of taxes and the protection of its citizens against irresponsible acts. To deny a noncomplying firm the right to enforce its claims does not satisfy either of these interests, but instead confers a windfall on the person against whom the claim would be outstanding. Even

considered as a deterrent rather than a remedial expedient, unenforceability of contracts is a crude and erratic punishment. Many offenders may be able to collect their claims without resort to legal action. Suit may be possible in another jurisdiction. ***And the firm which acts on a bona fide belief that it is not transacting such business as to bring it within a registration statute may be under the same disability as a wilful violator.*** if such provisions are desirable at all, it seems clear that room should be left for the courts to make exceptions." Note, *Foreign Corporations - State Boundaries for National Business*, supra at 746 (emphasis added).

Such then is the character of the state interest which is balanced against the negative effects of a departure from *Dahnke*.

In the cases which have upheld state regulation over a claim of burdensome effect on national interests, the Court has either determined that the state interest was very significant and that the state regulation was specifically designed to correct a real problem of legitimate local concern, or has concluded there was little, if any, detrimental effect to the federal common market.

The later case is illustrated by *Union Brokerage v. Jensen*, 322 U.S. 202 (1944) where the Court found that the business had established local offices and local operations like any other. The imposition of the qualification requirement on such operations had no real effect on interstate trade. Similar analysis also applies to *Eli Lilly* where the foreign corporation had established a local office and substantial intrastate activity and it was required to qualify. No negative effect on its interstate transactions, which the Court

found were "entirely separable" from the intrastate aspects of its business, would result from the decision.

In *Parker v. Brown*, 317 U.S. 341, 363-368 (1943), the Court not only found problems of a significant and specific state concern, it also found no conflict with the Commerce Clause where Congressional action in the field dovetailed with that of the state. "Examination of the evidence in this case and of available data of the raisin industry in California, of which we may take judicial notice, leaves no doubt that the evils attending the production and marketing of raisins in that state present a problem local in character and urgently demanding state action... * * * The history of the industry at least since 1929 is a record of a continuous search for expedients which would stabilize the marketing of the raisin crop and maintain a price standard which would bring fair return to the producers. It is significant of the relation of the local interest in maintaining this program to the national interest that ... the national government has contributed to these efforts either by its establishment of marketing programs pursuant to Act of Congress or by aiding programs sponsored by the State. * * * ... The Secretary of Agriculture..., instead of establishing a federal program has, as the [Agricultural Adjustment Act of 1938, 52 Stat. 31] authorizes, cooperated in promoting the state program and aided it by substantial federal loans. Hence we can not say that the effect of the state program on interstate commerce is one which conflicts with Congressional policy... [Nor does it] impair national control over the commerce in a manner or degree forbidden by the Constitution."

The Mississippi law falls far short of the affirmative requirements established in cases upholding state in-

trusions into interstate commerce. It is not consistent with the central principle of ***Dahnke***, ***Lemke***, ***Swift & Co.***, ***Hood***, and others, that a sale for shipment out of state is interstate commerce. It was not specifically designed to correct a significant problem of real local concern. To the contrary, it has been deemed "immoral" and "capricious," and it will reduce competition for the crops of Mississippi farmers. It does not dovetail with Congressional action, nor has it been approved by federal legislation. In fact, by discouraging the practice of forward contracting in Mississippi, it strikes at the cornerstone of the new programs of the Department of Agriculture established pursuant to P.L. 91-524 and P.L. 93-86 (see materials at ftns. 22-45, Statement of the Case).

In ***Pike v. Bruce Church***, 397 U.S. 137, 142 (1970), the Court emphasized another portion of the test for determining the validity of the state action: "If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on ***whether it could be promoted as well with a lesser impact on interstate activities***." (Emphasis added.)

Assuming that a legitimate local purpose is found in the Mississippi desire that all foreign corporations qualify if any business is transacted in Mississippi, that interest does not require an absolute prohibition from enforcement of contracts.

Most other states have not found the absolute prohibition to be necessary and have provided that a corporation may remove the disability from use of the courts by subsequently qualifying in the state. For example, the Model Business Corporation Act, prepared by the Committee on Corporate Laws of the American Bar Association, provides, at §124: "No foreign corporation transacting business in this State

without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any Court of this State, ***until such corporation shall have obtained a certificate of authority***." (Emphasis added.) (When Mississippi enacted the Model Business Corporation Act the emphasized words were intentionally left out of the statute. ***Parker v. Lin-Co. Producing Co.***, 197 So. 2d 228 (Miss. 1967).)

A recent study lists 42 states in which the statutory bar to enforcement is removed by subsequent qualification, and 5 states (Alabama, Arizona, Arkansas, Mississippi and Vermont) where such contract may not be enforced even after qualification. C. T. Corporation, ***What Constitutes Doing Business*** (1973) p. 6. (The status of the law in the other three states is apparently in doubt.)

Certainly allowing cure of the disability would promote any 'legitimate state interest with a lesser impact upon interstate activities.' Therefore, the Mississippi enforcement bar also fails to meet the test of ***Pike v. Bruce Church***.

CONCLUSION

Allenberg Cotton Company, Inc., has not been guilty of fraud, bad faith, immoral or illegal conduct. On the contrary, in January 1971 it entered into this and other freely bargained contracts to buy cotton for delivery in the fall and winter of 1971, and contemporaneously entered resale contracts. The price agreed between the parties, like the price of the offsetting sales, was based on the cotton market at the time of entering the contract. There was immediate and direct reliance by Allenberg upon the validity of the contract, and upon the continuing validity of long-standing principles of law. Those principles have been incorporated into federal and state statutory provisions, and into trade and commercial relationships and patterns.

Their abandonment would be deleterious to current federal farm programs, risk commercial upheaval on a substantial scale, inflict decided hardship on cotton merchants currently seeking to enforce 1973 forward contracts in Mississippi, Arkansas, and Alabama, reduce competition, and would produce windfall rewards for the immoral conduct of numerous selfishly motivated repudiators of solemn contractual promises. The legitimate interests of the State of Mississippi could be equally well served by other devices with a lesser impact on interstate activities, and do not require the implementation of the present "harsh, vindictive, and capricious" law by this Court.

For these reasons, the judgment of the Mississippi Supreme Court should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-628

ALLENBERG COTTON CO., INC., *Appellant*,

v.

BEN E. PITTMAN, *Appellee*.

On Appeal from the Supreme Court of Mississippi

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IN THE

Supreme Court of the United States

October Term, 1974

No. 73-628

Allenberg Cotton Co., Inc., *Appellant*,

v.

Ben E. Pittman, *Appellee*.

On Appeal from the Supreme Court of Mississippi

BRIEF FOR APPELLEE

QUESTIONS PRESENTED

I

Whether a foreign corporation engaged in buying and selling cotton which utilizes contracts calling for intrastate delivery to local warehouses where the cotton, now owned by the corporation, is stored pending shipment, may be required to qualify.

II

Whether this Court may review a state court decision interpreting a state statute in the context of state court decisions without a federal question being timely raised.

STATUTES INVOLVED

Relevant sections of the Mississippi Code are reprinted in Appendix A.

STATEMENT

Allenberg Cotton Company was incorporated in Tennessee in 1946. (A. 35) Its authorized activities include "carrying on the business of cotton merchants including the buying and selling of spot cotton, the dealing in cotton futures, the storing, warehousing, insuring, and hedging of cotton and cotton sales or purchases . . . ." (A. 35-6) The company's principal office is in Memphis (A. 93) and its business activities extend throughout the southern and southwestern United States. (A. 70, 77)

On November 10, 1971, Ben Pittman, a resident of Quitman County, Mississippi, entered into a contract to sell his cotton crop to Allenberg. Delivery was to be made at the Federal Compress and Warehouse Company in Marks, Mississippi. (A. 5-9) Upon delivery Pittman was to be paid the agreed-upon price and title transferred to Allenberg. *Ibid.* Allenberg's suit to enforce the contract gives rise to the instant case.

Cotton purchased through agents (A. 49, 72) by Allenberg under contracts similar to that of Ben Pittman in Mississippi for 1971 amounted to some 25,000 bales. (A. 71-72) This became part of a "perpetual inventory" (A. 92) of cotton stored in warehouses[1] throughout the state awaiting shipping orders originating in Memphis. (A. 93)

The contract utilized by Allenberg provides that costs incurred through ginning (cleaning) and delivery are borne by the farmer up to the "date of invoice." (A. 7) Costs of preparing bales for shipment (compressing) are not included. Finally, Allenberg delegates the following functions to Mississippi warehousemen:

> The actual picking out of the bales of cotton, tagging and marking them for shipment, loading the bales into cars and taking out the bill of lading are functions performed by warehousemen at the direction of the cotton merchant [in Memphis]. [*Brief for Appellant* 12.]

[1] Referred to as "cotton concentration" points by Appellant. *Brief for Appellant* 11.

SUMMARY OF ARGUMENT

Coe v. *Errol*, 116 U.S. 517, established the basic constitutional proposition that goods awaiting shipment in interstate commerce remain "with the general mass of property" of a state and under the protection of its laws, *i.e.*, until placed on a carrier or started on their final journey they are not in interstate commerce. The most recent decision defining "intrastate" activities for purposes of qualification, *Eli Lilly & Co.* v. *Sav-on-Drugs*, 366 U.S. 276, equates qualification with the imposition of excise taxes. Two decisions, springing from *Coe*, unequivocally hold that cotton buying and warehousing (business activities occurring prior to shipment and engaged in by Allenberg) can be subjected to such taxes. *Federal Compress & Warehouse Co.* v. *McLean*, 291 U.S. 17; *Chassinol* v. *Greenwood*, 291 U.S. 584. They are determinative of the instant case.

The case preceeding *Eli Lilly*, *Union Brokerage Co.* v. *Jensen*, 322 U.S. 202, was an unanimous decision written by Mr. Justice Frankfurter upholding a state qualification scheme as an exercise of state regulatory power. The decision establishes that a finding of "localized" activities by a company engaged in purely interstate and foreign commerce is sufficient for the imposition of a regulatory scheme "general in scope" and not "aimed at interstate and foreign commerce." Allenberg has "localized" its business by: (1) employing commissioned agents to purchase cotton; (2) entering into contracts with Mississippi farmers for intrastate delivery of their crop; and (3) establishing an agency relationship with Mississippi warehousemen for the

storage and ultimate placement of cotton on interstate carriers. The Mississippi Business Code is informational in nature and not aimed at interstate commerce. The requirements of *Union Brokerage* are therefore established in this case.

Finally, the Court lacks jurisdiction over the instant appeal. The Mississippi Supreme Court limited its analysis to an interpretation of a state statute through the utilization of state court decisions. Since the federal question was not timely raised, the decision must therefore be construed to rest on an adequate and independent state ground.

ARGUMENT

I. THE STATUTE IN QUESTION

The Court has entertained only two cases involving foreign[2] corporations and state qualification statutes in the past thirty-two years. *Eli Lilly & Co.* v. *Sav-on-Drugs*, 366 U.S. 276; *Union Brokerage Co.* v. *Jensen*, 322 U.S. 202.[3] While other portions of the brief deal with the current status and utilization of these statutes by the various states, the Mississippi penalty provision denying access to state courts deserves threshold analysis.

Techniques devised to insure qualification by foreign corporations vary widely.[4] In at least two of the states in

[2] As the term is used in this brief, a corporation is considered "foreign" in every state other than that of its incorporation.

[3] In addition to holding that under Guaranty Trust v. York, 326 U.S. 99, state penalties imposed on nonqualifying corporations are binding on federal courts hearing diversity suits. Woods v. Interstate Realty, 337 U.S. 535.

[4] For an early analysis see Note, *Contracts of Foreign Corporations Made Before Compliance with Local Statutory Conditions*, 11 COLUM L. REV. 779 (1911). The latest major detailed presentations are found in Note, *The Legal Consequences of Failure to Comply with Domestication Statutes*, 110 U. PA. L. REV. 241 (1961), and Note, *Sanctions for Failure to Comply with Corporate Qualification Statutes: An Evaluation*, 63 COLUM. L. REV. 117 (1963).

which Allenberg has qualified (*after* the decision of the lower court with respect to the Company's activities in Mississippi),[5] corporate officers, directors and agents are subject to incarceration for a period up to twelve months.[6] Levels of penalties in a subjectively descendent order (obviously variable with respect to the transaction involved)[7] include: declaring contracts made before compliance void;[8] injunctions;[9] denial of the right to enforce contracts in state court made prior to qualification (as in Mississippi);[10] denial of the benefit of the state's statute of limitations;[11]

[5] The decision of the Mississippi Supreme Court became final on May 14, 1973. Allenberg qualified in Alabama on September 6, 1973, and in Louisiana on September 14, 1973. Other states also indicate qualification subsequent to the lower court decision. *E.g.*, Texas (October 29, 1973); Arkansas (September 4, 1973); Missouri (September, 1973); North Carolina (October 30, 1973); South Carolina (September 14, 1973). See *Motion to Dismiss or Affirm*, Appendix A.

[6] ALA. CODE tit. 10, ch. 1A, § 94 (1958) (12 months); LA REV. STAT. ANN. § 12:315 (1969). Other provisions relating to jail sentences: FLA. STAT. ANN. § 613.01 (1956); MICH. COMP. LAWS ANN. § 450.96 (1973); OHIO REV. CODE ANN. § 1703.99 (Page 1964); OKLA. STAT. ANN. TIT. 18, § 1.238 (1953); ORE. REV. STAT. § 57.994 (1971).

[7] As demonstrated in the instant case. If Allenberg's contract was, for say, $200.00, the punishment imposed becomes proportionately less.

[8] See *e.g.*, ARK. STAT. ANN. 10-482 (1956) (voids all corporate acts); MONT. REV. CODE ANN. § 15-1703 (1955).

[9] *E.g.*, KAN. STAT. ANN. § 17-7308 (Supp. 1972); 1 ME. REV. STAT. ANN. tit. 13A § 1211 (Supp. 1973); MASS. GEN. LAWS ANN. Ch. 181 § 19 (1958).

[10] ALA. CODE tit. 10, ch. 1A, § 89 (1958) (imposed in addition to jail sentences, note 6, *supra*); ARIZ. REV. STAT. ANN. § 10-482 (1956); ARK. STAT. ANN. § 64-1202 (1966); VT. STAT. ANN. tit. 10, § 2120 (1973).

[11] IDAHO CODE § 30-509 (1967); MD. CODE ANN. art. 23, § 93 (1973); NEV. REV. STAT. § 80.220 (1967).

and the imposition of various levels of penalties through fines.[12] To evaluate the effectiveness of these and other measures, the *Columbia Law Review* conducted a survey. One conclusion:

> In an evaluation of corporate and individual penalties, the extent to which they are enforced is, of course, a relevant consideration. In most states the provisions are largely unenforced; indeed, in the *Survey* only seven of the thirty-six responding states indicated anything resembling active enforcement. Nonenforcement is due in large part to the failure to discover offending corporations, both because of a lack of personnel with which to police the provision and because of the difficulty involved in determining when a corporation is transacting local business. [Note, *Sanctions for Failure to Comply with Corporate Qualification Statutes: An Evaluation*, 63 COLUM. L. REV. 117, 122-23 (1963).]

With respect to a denial of the use of state courts:

> The broadest and most effective sanction provided for noncompliance . . . is the refusal to allow use of state courts for actions instituted by an unlicensed corporation. . . . In principle, denial of the use of state courts is equitable, because deprivation of benefits normally granted by the state is a commensurate sanction for failure to accept the reciprocal burdens prescribed by the state. Moreover, it is perhaps the most effective sanction currently employed, since it depends for its enforcement on adversarial parties who have both an opportunity for knowledge of the illegal activity and reason to raise the objection. *Because of the difficulties involved in discovery and enforcement by state officials, denial of access to state courts is an essential element of a statutory scheme designed to encourage compliance with qualification requirements.* [*Id.* at 126, 129-30. (Emphasis added.)]

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[12] *E.g.*, OHIO REV. CODE ANN. §§ 1703.99,-.71,-.99 (Page 1964) ($10,000); ALA. CODE tit. 10, ch. 1A§ 21 (92) (1958) ($1,000); ALASKA STAT. § 10.05.771 (1968) (10% of past taxes owed); CONN. GEN. STAT. ANN. § 33-412 (1960) ($500).

A division of opinion exists with respect to statutes (like Mississippi's) denying the right to sue on debts *antecedent* to the time of qualification.[13] Those arguing against such statutes point to resulting "windfalls" for some who deal with an unregistered corporation. *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 538, 539-40 (1949) (Jackson J., dissenting) Comment, *Foreign Corporations—State Boundaries For National Business*, 59 YALE L. J. 736, 746 (1950).[14] The argument in favor is described by the *Pennsylvania Law Review:*

> Several consequences may follow [when foreign corporations are permitted to sue for debts incurred prior to qualification] . . . . For one, foreign corporations may be encouraged to do intrastate business while undomesticated, assuming the risk that if they eventually need the services of local courts they may have to pay a penalty and accrued fees. The disability, [however], need be of concern only if it is invoked in litigation. For another, a statute which merely defers the time of trial and provides a local citizen with no substantive defense against a foreign corporation is not likely to be invoked with regularity. Such a statute fails as a weapon when the state delegates its enforcement to defendants, since they cannot be relied upon to abate suits, if delay is not in their best interests. *Thus, corporate offenders, both the crafty and the inadvertent,*

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[13] A majority of states and the District of Columbia allow the corporation to bring suit upon subsequent filing. See *Statutory Restrictions on Enforcement of Contracts*, 23 CORP. J. 323, 324 (1963); Note, *Right of a Foreign Corporation to Sue Upon Contracts in Montana Courts—Doing Business—Failure to Qualify—Subsequent Qualification*, 26 MONT. L. REV. 218 (1965).

[14] *Cf.*, Note, *Foreign Corporations: The Interrelation of Jurisdiction & Qualification*, 33 IND. L. J. 358, 371 (1958): "Furthermore, the doing business for qualification issue arises when an unqualified corporation seeks to sue, and the emotional pull is for the corporate plaintiff vis-a-vis the would-be excused defendant."

may remain undetected indefinitely—the desired information and unobtained revenue lost. [Note, *The Legal Consequences of Failure to Comply with Domestication Statutes,* 110 U. PA. L. REV. 241, 267-68 (1961). (Emphasis added.)]

The Mississippi statute can therefore be conceptualized as one delegating to citizens of the state the role of "private attorney generals," *Marvin* v. *Trout,* 199 U.S. 212; *FCC* v. *Sanders Bros. Radio Station,* 309 U.S. 470, hopefully providing an effective deterrent against noncomplying foreign corporations.[15] One initial determination in all noncompliance situations, however, is the presence or absence of localized (intrastate) activity; and that is what this case is all about.

II. QUALIFICATION & ALLENBERG COTTON CO., INC.

A foreign corporation engaged in purely interstate commerce within a state may conduct its business without interference from the requirements of qualification. *International Textbook* v. *Pigg,* 217 U.S. 91. It is equally well settled, however, that a foreign company engaged in interstate as well as intrastate (localized) business within a state can be required to secure a certificate of authority. *Eli Lilly & Co.* v. *Sav-on-Drugs,* 366 U.S. 276, 279; *Union Brokerage Co.* v. *Jensen,* 322 U.S. 202.

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[15] The choice by the state is a political one, and not of constitutional proportions. *E.g.*, Missouri v. Lewis, 101 U.S. 22, 30 ("it is the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject matter and amount . . . .") ; Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 589-91; Paul v. Virginia, 75 U.S. (8 Wall.) 168. Critics of statutes such as Mississippi's note a double-edged sword, *i.e.*, their existence may depress "any movement to attract new industry." Note, 26 MONT. L. REV., *supra* note 12 at 277; Note, 19 ALA. L. REV. 193, 201 (1967).

A. Eli Lilly & Co. v. Sav-on-Drugs

The latest case detailing constitutional criteria for determining intrastate commerce in the context of state qualification statutes is *Eli Lilly & Co.* v. *Sav-on-Drugs, supra.* An Indiana corporation (Lilly) sold products in interstate commerce to wholesalers in New Jersey. It also maintained an office in the state for eighteen detailmen whose jobs were to promote and disseminate information about the company's products to retailers and consumers. Lilly brought suit in a New Jersey state court to enjoin a local company from selling Lilly's products below prices fixed in minimum retail-price contracts.[16] A motion to dismiss was filed by the defendant on the ground that the plaintiff was doing intrastate business in New Jersey without complying with the registration requirements of the state's corporation act.[17] Lilly opposed the motion contending that its business in the state was purely interstate.

The Court was in agreement that New Jersey's qualification requirement was to be equated with a "license."[18] 366 U.S. at 278, 282 (majority opinion); 286 (concurring opinion); 289 (dissent). In holding that Lilly was required to qualify, the majority relied on two separate findings. First, the cause of action (enjoining intrastate sales) was "entirely separable from any particular interstate activity." 366 U.S. at 282-83. Second, collateral activities of the eighteen detailmen in the state included inducing local merchants to buy goods from others and were there-

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[16] In violation of the New Jersey Fair Trade Act. N.J. REV. STAT. § 56: 4-6 (1937).

[17] N.J. REV. STAT. § 14:15-4 (1937) (foreign corporation transacting business in the state without registering is denied the right to bring any action in New Jersey courts).

[18] This conclusion is in accord with earlier decisions, relating to state qualification requirements. *E.g.*, Crutcher v. Kentucky, 141 U.S. 47; International Textbook v. Pigg, 217 U.S. 91. But see Union Brokerage v. Jensen, 322 U.S. 202.

fore "intrastate" and/or sufficiently local in nature to deny the company benefits which it claimed under the commerce clause. Authority for the latter proposition was based on *Cheney Bros. Co.* v. *Massachusetts,* 246 U.S. 147, involving an excise tax sustained in a somewhat similar factual situation ("turn-over" orders). The dissent, although disturbed over the potential for intermingling tax, service of process and licensing cases, 366 U.S. at 297, relied on the "drummer" or license tax cases beginning with *Robbins* v. *Shelby County Taxing Dist.,* 120 U.S. 489, as authority for the proposition that Lilly was engaged in purely interstate commerce. Having equated qualification with license taxes, the former requirement (as applied to Lilly) was found to smack of the same constitutional taint, *i.e.,* "a tax imposed upon the solicitation of interstate business is a tax on interstate commerce itself." 366 U.S. at 290.[19]

B. Eli Lilly as Applied to Allenberg

The *Lilly* analysis is fully applicable to the instant case. First, the cause of action is intrastate: enforcement of a contract calling for delivery of cotton from the field to an in-state warehouse. Second, although Allenberg is involved in interstate commerce within the state of Mississippi (sales of cotton pursuant to orders from Memphis), decisions of this Court clearly demonstrate that its business possesses aspects which are definitely intrastate. These include: (1) purchasing cotton for intrastate delivery; (2) storage—for its own business purposes—in warehouses throughout the state pending shipment and/or shipment subsequent to future sale; and (3) utilization of warehousemen as agents for the performance of all necessary activities prior to placement of bales of cotton on interstate carriers.

The majority and dissent in *Lilly* agree that defining intrastate commerce for purposes of qualification requires

[19] Citing Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389, 392-93.

the utilization of licensing and privilege tax decisions. Two cases involving these tax classifications decided in the *exact* context of Allenberg's business are dispositive: both conclude that the incidence of the tax is on intrastate commerce.

In *Federal Compress & Warehouse Co.* v. *McLean,* 291 U.S. 17, the validity of state excise taxes as applied to cotton warehouse and compress businesses[20] (facilities identical to those utilized by Allenberg) were attacked as interfering with interstate commerce. Rejecting the argument, the Court concluded:

> It is clear that by all accepted tests the cotton, while in [the] . . . warehouse, has not begun to move in interstate commerce and hence is not a subject of interstate commerce immune from local taxation. When it comes to rest there, its intrastate journey . . . comes to an end, and although in the ordinary course of business the cotton would ultimately reach points outside the state, its journey interstate does not begin and so it does not become exempt from local tax until its shipment to points of destination outside the state. . . . Property thus withdrawn from transportation, whether intrastate or interstate, until restored to a transportation movement interstate, has often been held to be subject to local taxation. [291 U.S. at 21.]

Closer to the point is *Chassinol* v. *Greenwood,* 291 U.S. 584. As noted in the Statement of Fact, Allenberg, in accord with its corporate charter, is engaged in the buying and selling of cotton. In *Chassinol* the city imposed a *license tax* upon those engaged in Allenberg's corporate business, *i.e.,* "upon every person engaged in the business of buying and selling cotton for himself" within the city.

[20] The statutes in question enacted "an annual license tax for the privilege of operating a cotton compress . . . [and] a similar additional tax upon each person operating a warehouse . . . ." 291 U.S. at 18-19.

291 U.S. at 585. The buyers in that case, as with Allenberg here, became absolute owners of cotton with the intention of "immediate or future delivery in other states or countries . . . ." 291 U.S. at 586. The same argument now made by Allenberg was employed:

> Chassinol contends that all the cotton is in interstate or foreign commerce from the moment it leaves the gin for Greenwood, or at least from the moment it is purchased at Greenwood by the buyer. The argument is that already at that time the cotton is destined for ultimate shipment to some other state or country; and that to tax the occupation of the cotton buyer burdens interstate commerce, since the buyer . . . is the instrumentality by which the interstate transaction is initiated. [*Ibid.*]

Citing *Federal Compress* the Court rejected the argument:

> Ginning cotton, transporting it to Greenwood, and warehousing, buying and compressing it there, are each, like the growing of it, steps in preparation for the sale and shipment in interstate and foreign commerce. But each step prior to the sale and shipment is a transaction local to Mississippi, a transaction in intrastate commerce. Hence those engaged in performing any such local function may be subjected to an occupation tax, just as the property used, or processed, by them may be subjected to a property tax. [291 U.S. at 587.]

Chassinol has been interpreted by the Court to stand for the clear holding that "a state is free to *license and tax intrastate buying* where the purchaser expects in the usual course of business to resell in interstate commerce." *Parker* v. *Brown*, 317 U.S. 341, 361. (Emphasis added.) Pursuant to *Lilly* the conclusion inevitably follows that Allenberg can be required to secure a certificate of qualification (a license).

The instant case (as contrasted with *Lilly*) also permits a constitutional analysis extending beyond decisions limited

to licensing and privilege taxes. As alluded to in *Chassinol*, the power of a state with respect to those exerting control over goods at rest (though destined for interstate commerce) *as well as the goods themselves* is identical. Mr. Justice Rutledge in *Independent Warehouses, Inc.* v. *Scheele*, 331 U.S. 70 (license tax; business of storing goods), describes the point:

> The authorities [previously cited] . . . generally involved property taxes . . . or other taxes upon the business of furnishing the storage facilities . . . . It would be an impermissable anomaly to hold that the goods stored may be taxed . . . but that the business of furnishing the facilities for storing them is not affected or governed legally by the same purposes, for applying the state's power of taxation. [331 U.S. at 85.]

The constitutional underpinnings for *Federal Compress* and *Chassinol* spring from *Coe* v. *Errol*, 116 U.S. 517, involving two lots of logs. With respect to the logs cut in New Hampshire and gathered to await ultimate transit on the Androscoggin for shipment to another state, the Court found that the taxing power of the state was properly exerted. After rejecting the "state of mind" of the owner as constitutionally insignificant, 116 U.S. at 525-26, the Court reviewed the activities in question in the context of when interstate commerce (and therefore immunity from direct taxation) begins:

> "Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity does not begin until the articles have been shipped or started for transportation from the one state to another. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. This is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. *Until actually launched on its way to another state, or committed to*

> *a common carrier for transportation to such state, its destination is not fixed and certain.* [116 U.S. at 528. (Emphasis added)].[21]

The constitutional status of *Coe* is reflected by numerous holdings that goods do not cease to be part of the general mass of property within a state subject to nondiscriminatory exercises of state taxing powers until they have been shipped or "entered" with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey.[22] *E.g.*, *Superior Oil Co.* v. *Mississippi*, 280 U.S. 390 (tax on gasoline stored prior to interstate shipment); *Dept. of Treasury* v. *Wood Preserving Corp.*, 313 U.S. 62 (gross receipts tax on railroad ties delivered to but not immediately loaded on railroad cars); *Turpin* v. *Burgess*, 117 U.S. 504 (excise tax on tobacco exacted before removal for export); *State Tax Comm'n* v. *Pacific States Cast Iron Pipe Co.*, 372 U.S. 605 (sales tax on pipe; passage of title and delivery occurring in taxing state and actual placement on common carrier occurring at a later date); *International Harvester Co.* v. *Dept. of Treasury*, 322 U.S. 340, 345 ("immaterial to the present case that the goods are to be transported out of [the state] . . . immediately on delivery") (gross receipts tax on sale).

[21] See also, Hughes Bros. Timber Co. v. Minnesota, 272 U.S. 469, 475: "The conclusion in cases like this must be determined by the various circumstances. Mere intention by the owner ultimately to send the logs out of the state does not put them in interstate commerce, nor does the preparatory gathering, for that purpose, at a depot. It must appear that the movement for another State has actually begun and is going on. Solution is easy when the shipment has been delivered to a carrier for a destination in another State." General Oil Co. v. Crain, 209 U.S. 211, 228-29: "the beginning . . . [of] interstate commerce is easy to mark . . . [as] the point in time an article is committed to a carrier . . . ."

[22] This rule, although formulated to determine the validity under the commerce clause of a nondiscriminatory state tax, is equally applicable to cases arising either under Art. I § 10, cl. 2, restricting the states in taxing imports or exports, or under Art. I, § 9, cl. 5, prohibiting Congress from laying any tax upon "articles exported from any state." Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69; Empresa Siderugica S.A. v. County of Mereed, 337 U.S. 154. It is, of course, equally applicable to ad valorem property taxes and sales taxes—the issue in each situation being whether the goods are in the "stream of exports" at the moment they are taxed. If the articles have not in tax day entered foreign commerce, even though they are destined for export, they are subject to state ad valorem property taxes. Coe v. Errol, *supra*. And this Court has held that this is so even though goods are being packed, or after having been packed, are awaiting the carrier. Empresa Siderugica S.A. v. County of Mereed, *supra*.

Kosydar v. *National Cash Register Co.*, 42 L. W. 4767, is the latest in this line of cases. National Cash Register built machines to foreign buyers' specifications. Pending shipment they were warehoused in Ohio with title, possession, and control remaining with the manufacturer. In holding that this property was not immune from an ad valorem tax, the Court relied explicitly on *Coe* v. *Errol*, concluding:

> It may be said that *insistence upon an actual movement* into the stream of export in the case at hand represents an overly wooden or mechanistic application of the *Coe* doctrine. This is an instance, however, where we believe that simplicity has its virtues. [42 L.W. at 4770. (Emphasis added.)]

Lilly mandates that principles enunciated from 1886 (*Coe* v. *Errol*) to 1974 (*Kosydar*) be applied for purposes of qualification. A decision to this effect substantiates the common understanding of when qualification is required.

C. Dahnke-Walker and Secondary Authorities

While this Court has not been presented with a similar factual situation, major secondary authorities are in agreement that the business format employed by Allenberg subjects it to qualification. They are also in agreement that

Appellant's major case, *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, is inapplicable.

Dahnke-Walker involved a sale of grain under a contract calling for delivery aboard a carrier for interstate shipment. As described: "[W]hat otherwise seemed an intrastate transaction was a part of interstate commerce." 257 U.S. at 292. The decision is consistently referred to and limited as involving a "unitary interstate transaction," *Eli Lilly & Co., supra*, at 292 (dissenting opinion); *Union Brokerage* v. *Jensen*, 322 U.S. 202, 211, and fits into the well established line of decisions flowing from *Coe* v. *Errol* making clear that once delivery to a common carrier occurs, interstate commerce (for purposes of immunity from *direct* exercises of state taxing powers) has begun. *E.g., Hughes Bros. Timber Co.* v. *Minnesota*, 272 U.S. 469, 475 ("solution is easy when the shipment has been delivered to a carrier . . . ."); *General Oil Co.* v. *Crain*, 209 U.S. 211, 228-9 ("the beginning . . . [of] interstate commerce is easy to mark . . . [as] the point in time an article is committed to a carrier . . . ."); *Diamond Match Co.* v. *Ontonagon*, 188 U.S. 82, 95 ("movement [in interstate commerce] . . . does not begin until the articles have been shipped . . . and [carrying them to the depot] is no part of that journey."); *A. G. Spaulding & Bros.* v. *Edwards*, 262 U.S. 66, 70 ("overt act of delivering the goods to the carrier marks the point of distinction . . . .").[23]

Prentice-Hall, in its corporate service manual section on qualification, notes *Superior Oil Co.* v. *Mississippi*, 280 U.S.

[23] See also, Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166-67: "The problem in this case is not whether the State could tax the actual gathering of all gas whether transmitted in interstate commerce or not . . . but whether here the State has delayed the incidence of the tax beyond the step where processing have ceased and transmission in interstate commerce has begun . . . ."

390, upholding a state tax on gasoline delivered to a wharf where it was *stored* prior to shipment to Louisiana. The commentary continues:

> But the mere fact that goods purchased in the state are transported beyond its boundaries may not be enough to constitute the transaction interstate commerce . . . . It is important to distinguish [*Superior Oil* from *Dahnke-Walker*] . . . for the two present points of similarity. In both cases the purchaser bought the goods in the state and they were delivered there, but in the oil company case delivery was made to the purchaser who *later* transported the oil out of the state, and in the Milling company case delivery was to a *common carrier* for transportation to the buyer's mill in another state. [1 PRENTICE-HALL, CORPORATIONS ¶ 7450, p. 7344. (Emphasis added.)]

Concluding its advice to foreign corporations as to *qualification* when making purchases in other states for delivery out of those states, the manual advises:

> ➡ WHAT TO DO ➡ *Delivery to carriers:* To avoid "doing business" liability [qualification] on purchases, make sure that goods are *delivered to carrier* for outstate shipment. *Pending sale:* If instate purchases are made with the expectation of resale, corporation, instead of taking immediate delivery within the state pending outstate sale could arrange for seller to hold goods until subsequent sale is made and then have direct shipment made to outstate purchasers. [1 PRENTICE-HALL, CORPORATIONS, ¶ 7450, p. 7346. (Emphasis added.)]

Fletcher, discusses qualification as a matter of black-letter law and distinguishes *Dahnke* on the following basis:

> The purchase of goods by a foreign corporation for shipment to another state constitutes interstate commerce, and the commerce includes the purchase quite as much as the transportation [citing *Dahnke*]. A mere purchase in the state, however, without a ship-

ment outside the state, does not constitute interstate commerce . . . .[24] [17 W. FLETCHER, CYCLOPEDIA CORPORATIONS § 8415, pp. 374-5 (1960).]

The treatise foregoes an analysis of this Court's decisions with respect to taxing and relies on decisions involving qualification from lower courts.

D. Lower Court Decisions

In re Conecuh Pine Lumber & Mfg. Co., 180 Fed. 249, involves an attempt by an unlicensed foreign corporation to sue on a contract for the delivery of 3,000,000 feet of lumber. The lumber was intended for out-of-state shipment but delivery and title passed at a point described as "Elmore Station" in the state in which the corporation had failed to qualify (Alabama). Concluding that the transaction was intrastate in nature (thereby precluding utilization of the court to enforce the contract), the opinion utilizes an analysis directly applicable to the Allenberg situation:

> How can the fact . . . that the Lumber Company, when it entered into this contract, had the intention to sell the lumber so purchased here only to persons in other states, convert what was done at Elmore Station where the lumber was inspected, received and stored for future shipment, into a transaction in interstate commerce? [Citing *Coe* v. *Errol*] . . . . The lumber at that time had not started on an interstate journey . . . . Its destination, when the contract was made and acts done under it, was Elmore Station. When it was delivered, it was in compliance with the contract and the legal title and full ownership of the lumber vested and remained in the Lumber Company . . . .
>
> Having reached its destination, and been received in this state, and held there for subsequent resale, the lumber became intermingled with the general mass of property in Alabama, was under the protection of its

[24] Citing Sunlight Produce Co. v. State, 183 Ark. 64, 35 S.W. 2d 342, a state court decision involving storage of goods prior to interstate commerce. It is treated in the text, *infra*.

> laws, and subject to local taxation. Its situs and status are in no way changed because the Lumber Company, when it brought, had the intent to resell and ship the lumber to any one who might buy it for shipment out of the state. [180 Fed. at 251-2.]

In *Sunlight Produce Co.* v. *State*, 183 Ark. 64 35 S. W. 2d 342, the court held that a company purchasing poultry, eggs and cream through an agent in the state was required to secure a certificate of authority because the products bought were stored prior to placement on a carrier. *State* v. *Pioneer Creamery Co.*, 211 Mo. App. 116, 245 S. W. 2d 362, involved an agent for a foreign corporation purchasing cream, placing it in a storeroom and subsequently shipping it to the corporation in another state where it was turned into butter. Noting that the contracts of purchase called for intrastate delivery with a delay prior to interstate transit, the court rejected a contention that the business was interstate and therefore no certificate to do business was required. The opinion penetrates the practical consequences of Allenberg's argument:

> It would naturally follow that every kind of business transacted in this state for the purchase of material of any kind, which was afterwards shipped to another state . . . would or could be made interstate commerce. The business transacted by the defendant in this state was separate and distinct from interstate commerce and subject to the laws of this state governing foreign corporations. [211 Mo. App. at 117, 245 S. W. at 363.]

These cases reflect the state of the law in the lower courts prior to the intervening decision by Judge Orma Smith in *Cone Mills* v. *Hurdle*, 369 F. Supp. 426 (N.D. Miss.)

E. The Cone Mills Decision

Judge Smith holds that purchases by foreign corporations of cotton followed by subsequent storage pending

out-of-state shipment is interstate commerce. In conclusion:

> As in *Dahnke-Walker*, the contracts in these cases were negotiated and executed in the forum state, the commodity was to be delivered to the seller and paid for by the buyer in Mississippi, and the commodity involved was one of nationwide importance. [369 F. Supp. at 436.]

Delivery to a carrier is not constitutionally significant. Presumably, the more important the commodity, the more "interstate commerce" is to be inferred.

No issue with respect to Congress' power to regulate was in issue; the question of pre-emption was never posed. In what may be considered an alternate holding in the case, Judge Smith defines limitations on state power in the context of such cases as *Wickard* v. *Filburn*, 317 U.S. 111, *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, and Mr. Justice Holmes' conclusion in *Swift & Co.* v. *United States*, 196 U.S. 375, 398, that interstate commerce "is not a technical legal conception, but a practical one drawn from the course of business." 369 F. Supp. at 436. Appellee can only respectfully note that the "aggregate effects" test and Justice Holmes' reference to a "practical" conception of interstate commerce refers to congressional power under the commerce clause;[25] not exercises of state power.

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[25] Though no issue of pre-emption is raised in the questions presented, this approach is more fully developed by *Amicus* (who participated in *Cone Mills*) by extensive reference to irrelevant federal legislation, e.g., the Cotton Research & Promotion Act, and to the innumerable decisions by this Court springing from NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, as well as those in the lower federal courts. *E.g.*, Bruhn's Freezer Meats v. Department of Agriculture, 438 F.2d 1332 (8th Cir.) (violations of the Packers and Stockyards Act). If a serious attempt is made to raise the issue of pre-emption reference is made to Union Brokerage Co. v. Jensen, 322 U.S. 202, where a business *directly regulated* by Congress was denied the defense of pre-emption in the context of a state qualification statute. See also Federal Compress v. McLean, *supra*. The issue would be raised if Congress, pursuant to its powers under the commerce clause, passed a federal incorporation statute. See *Hearings Before a Subcommittee of the Committee on the Judiciary* on S. 10 and S. 3072, 75th Cong., 1st & 3d Sess. (1937-8); Robbins, *Federal Licensing of Business Corporations*, 13 TUL. L. REV. 214 (1939); Chaplin, *National Incorporation*, 5 COL. L. REV. 415 (1905).

The most disturbing aspect of the decision is Judge Smith's reliance on language utilized by Mr. Justice Van Devanter in *Dahnke-Walker* and *Shafer* v. *Farmers Grain Co.*, 268 U.S. 189. The latter case is a 1924 decision involving a detailed state regulatory scheme known as the North Dakota Grain Grading Act. Certain buyers of wheat argued that the Act was an invalid exercise of state power on two grounds: (1) it "burdened" interstate commerce; and (2) its provisions conflicted with the United States Grain Standards Act regulating the same industry. 268 U.S. at 191.

In holding the act unconstitutional Mr. Justice Van Devanter uses language which—if constitutionally sound—expands the definition of interstate commerce found in *Coe* v. *Errol*:

> *Buying for shipment*, and shipping, to markets in other states, when conducted as before shown, constitutes interstate commerce, *the buying being as much a part of it as the shipping* . . . Stafford v. Wallace, 285 U.S. 495 . . . Binderup v. Pathe Exch., 263 U.S. 291 . . . .
>
> Wheat . . . is a legitimate article of commerce and the subject of dealings that are nationwide. The right to buy it for shipment, and to ship it, in interstate commerce, is not a privilege derived from state laws, and which they may feter with conditions, *but is a common right, the regulation of which is committed to Congress and denied to the states by the commerce clause of the Constitution.* [268 U.S. at 198-99.]

With respect to this portion of the opinion certain comments are in order. First, the constitutional analysis employed (no regulation of interstate commerce) is no longer valid. See, *e.g.*, *South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U.S. 177; *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761; *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520. Second, the definition given to interstate commerce (buying for shipment) has only remained viable by this Court's limitation of the case to its facts. For instance, in *Parker* v. *Brown*, 317 U.S. 341, 361 (regulation of raisen marketing) the Court comments:

> There [in *Shaffer*] the state regulation held invalid was of the business of those who purchased grain within the state for immediate shipment out of it. The Court was of opinion that the purchase of the wheat for shipment out of the state without resale or processing was a part of interstate commerce. Compare Chassinol v. Greenwood, 291 U.S. 584

Distinguishing *Shaffer* from *Chassinol* (regulating cotton buying), is sufficient for the instant case. A serious question remains, however, as to whether *Shaffer* continues to deserve such tender treatment.

Discussion of the now defunct theory of "dual federalism" and the conflicting analyses utilized by the Court with respect to cases arising under the Commerce Clause prior to 1937 serves little purpose. See Stern, *The Commerce Clause & the National Economy*, 1933-46,[26] 59 HARV. L. REV. 645, 833 (1946); Compare *Kidd* v. *Pearson*, 128 U.S. 1 (manufacturing is not interstate commerce) *with United States* v. *E. C. Knight Co.*, 156 U.S. 1 and *Hammer* v. *Dagenhart*, 247 U.S. 251. What should be noted with specific respect to *Shaffer* are the cases relied upon to substantiate the proposition that "buying for shipment" constitutes interstate commerce. *Stafford* v. *Wallace* upheld the constitutionality of the Packers and Stockyards Act and *Binderup* v. *Pathe Exchange*, the Sherman Act as applied to certain motion-picture distributors. The *only* reasonable conclusion which can be drawn is that Justice Van Devanter, in defining "interstate commerce" for purposes of state power when Congress has legislated specifically on the subject, was—in today's sense—talking pre-emption. The latter part of the quotation speaking of a "common right . . . committed to Congress" reinforces this conclusion as does a comparison of the provisions of the United Grain Standards Act with applicable sections of the North Dakota Act. Finally, the latter part of the opinion rejecting the contention that North Dakota inspection regulations "assisted" the carrying out of the purposes of the United States Grain Standards Act, 268 U.S. at 202-03, fits well within this analysis. Compare *Campbell* v. *Hussey*, 368 U.S. 297, 302 ("complementary state regulation is as fatal as state regulations which conflict with the federal scheme") *with Florida Lime & Avacado Growers, Inc.* v. *Paul*, 373 U.S. 132 (neither such actual conflict between the two schemes of regulation that both could stand in the same area, nor evidence of congressional design to pre-empt the field); See also Note, *Pre-Emption As a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 310 (1959). The decision is—by today's standards—correct. The unfortunate language found in the opinion, however, cannot remain untouched.

Somewhat different issues are raised by Mr. Justice Van Devanter's opinion in *Dahnke*. As a threshold proposition

> [t]he commerce clause of the Constitution . . . expressly commits to Congress and impliedly withholds from the several states the power to regulate commerce among the latter. [257 U.S. at 290]

[26] "In many of the cases . . . [prior to 1935] the technique by which the Court proceeded was to decide whether a subject was or was not interstate commerce; if it was, Congress alone could regulate it and, if not, only the state could." 59 HARV. L. REV. at 648.

The opinion then continues into that portion relied upon by Judge Smith and opposing counsel:

> "'Commerce' is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, sale, and exchange of commodities." In Kidd v. Pearson . . . it was tersely said: "Buying and selling and the transportation incidental thereto constitute commerce." In United States v. E. C. Knight Co. . . . "contracts to buy, sell, or exchange goods to be transported among the several states" were declared "part of interstate trade or commerce." And in Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 . . . the court referred to the prior decisions as establishing that "interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property . . . but also the purchase, sale and exchange of commodities." *In no case has the court made the distinction between buying and selling, or between buying for transportation to another state and transporting for sale in another state.* [257 U.S. at 291].

Dahnke was not decided in a context of federal legislation directly bearing on a transaction said to be subject to the regulatory power of the state (interstate sale of wheat). Thus, the constitutional analysis employed can only be understood in the context of the threshhold concept, *i.e.*, the commerce clause, *by its own power*, prohibits state regulation of those activities deemed "interstate commerce." Finding language in *Knight* and *Addyston* (interpretations of the Sherman Act) defining "interstate commerce" in the sense of constitutionally exercisable powers of Congress (regulating buying, selling, etc.),[27] the fact that it (the power of Congress) had not been exercised was not significant since the *existence* of that power was understood

[27] As in *Kidd* where "manufacturing" was distinguished for purposes of state regulation.

to prohibit any regulation by the states. As previously noted, this constitutional proposition has long since been discarded by the Court. Again, as in *Shaffer*, the result reached in the case (delivery on board carrier is "interstate commerce") is correct. It is the analysis which is tainted.

III. TAXING CASES AND QUALIFICATION

Lilly, in utilizing taxing cases as the constitutional model for qualification, poses analytical difficulties by failing to explain why such cases are appropriate.[28] The interrelation between qualification and the exercise of state taxing powers is recognized, however, as a fulcrum point for an improved utilization of the latter[29] by many commentaries on the subject:

> [C]orporate offenders, both the crafty and the inadvertant, may remain undetected indefinitely—the de-

[28] Leading to at least one plausable explanation: the facts in *Lilly* more closely paralleled taxing cases than other areas relating to exercises of state power. This facit of the opinion is a basis for criticism the case has received. See Note, *Corporate Registration: A Functional Analysis of Doing Business*, 71 YALE L. J. 575, 590-91 (1962); Comment, *The Lilly Case: Dictum, Holding & Finding*, 57 N.W.U.L. REV. 306 (1962); 75 HARV. L. REV. 138, 140 (1962) ("line drawn by *Lilly* is not entirely clear"); Note, *Foreign Corporations—Promotional Activities May Subject Foreign Corporation to State Qualification Statute*, 15 VAND. L. REV. 650, 653 (1962) ("It would seem that the mechanical 'doing business' test which the Court continues to apply in such cases is destined to compound rather than clarify the confusion which now exists."). These and other commentaries, however, see *Lilly* as an acceptable "increase" of state power over foreign corporations. Note, 47 CORN. L. Q. 300, 308 (1962); Comment, *Corporations—What Constitutes "Doing Business" to Require a Foreign Corporation to Obtain a Certificate of Authority in Order to be Able to Maintain a Suit Within the State*, 8 N.Y.L. FORUM 293, 298 (1963); Note, 19 ALA. L. REV. 193 (1962).

[29] The drive to more fully integrate qualification statutes with state taxing laws is demonstrated by a significant number of states which utilize the secretary of state's office (or its equiva-

sired information and unobtained revenue lost [when qualification is not effectuated.] [Note, *The Legal Consequences of Failure to Comply with Domestication Statutes,* 110 U. Pa. L. Rev. 241, 267-8 (1961).]

The requirements thus established [for qualification] are designed to [among other things] eliminate tax evasion. [Note, *Sanctions for Failure to Comply With Corporate Qualification Statutes: An Evaluation,* 63 Colum. L. Rev. 117 (1963)].

State benefits sought are more adequate protection of citizens and enforcement of applicable state laws on the basis of information filed. . . . The availability of information to state citizens and tax assessors is a legitimate state interest . . . . [Comment, *The Lilly Case: Dictum, Holding, & Finding,* 57 N.W.U.L.Rev. 306, 321-22 (1962)].

The state's interest in registration lies in the receipt of taxes . . . . [Comment, *Foreign Corporations—State Boundaries for National Business,* 59 Yale L. J. 736, 746 (1950)].

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lent) as an adjunct to the taxing division of state government. *Fixed fee imposed as a tax:* Colo. Rev. Stat. Ann. § 31-10-7 (1964); Conn. Gen. Stat. Ann. § 33-405 (1960); Oregon Rev. Stat. § 57.769 (1971). *Authorized capital stock taxes: e.g.,* Idaho Code § 30-506 (1967); Me. Rev. Stat. Ann. tit. 13-A, § 1413 (Supp. 1973); Neb. Rev. Stat. § 33-101 (Cum. Supp. 1965); N.C. Gen. Stat. § 55-156 (Supp. 1973); *Capital within the state:* Ill. Stat. Ann. ch. 32 § 157.135-157.140 (Smith-Hurd. 1954); Iowa Code Ann. § 494.13 (1949); Wash. Rev. Code 23A 40.140 (1969). *Minimum fixed fee plus an additional pro rata gross receipts tax:* Mont. Rev. Code Ann. § 15-22-124 (1967); N.D. Cent. Code § 10-23-07 (1960). *Liability for taxes due the state:* Okla. Stat. Ann. tit. 18, § 1.201 (1953); Ohio Rev. Code Ann. § 1703.29 (Page 1964); S. C. Code Ann. § 12-23.15 (Supp. 1974).

One state exceeds the constitutional limits set forth in *Lilly* (no qualification for soliciting "purely" interstate sales) by requiring qualification for those businesses subject to use taxes. See Fla. Stat. Ann. § 212.06 (g) (1971), described more fully in section V, *infra.*

Many requirements for qualification found in the Mississippi Code relate to providing information, *e.g.,* listing authorized stock, names of directors, etc.[30] Foreign corporations, however, must also file:

> An estimate, expressed in dollars, of the value of all property to be owned by the corporation for the following year, wherever located, *and an estimate of the value of the property of the corporation to be located within the state during such year,* and an estimate expressed in dollars, of the gross amount of business which will be transacted by the corporation during such year, *and an estimate of the gross amount thereof which will be transacted by the corporation at or from places of business in this state during such year.* [Miss. Code Ann. § 79-3-219(k) (1972) (Emphasis added).]

The link to one portion of the Mississippi Code on taxation is direct:

> There is hereby imposed . . . upon every corporation . . . *organized and existing under and by virtue of the laws of some other state* . . . a franchise or excise tax equal to two dollars and fifty cents on each one thousand dollars or fraction thereof *of the value of capital used, invested or employed within the state* . . . It is the purpose of this section to require the payment of a tax by all organizations not organized under the laws of this state, measured by the amount of capital or its equivalent, for which such organization receives the benefit and protection of the government and laws of the state. [Miss. Code Ann. § 27-13-7 (1972). (Emphasis added.)] [31]

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[30] See Miss. Code Ann. § 79-3-219 (1972), relating to perfunctory requirements as to information required.

[31] *Amicus* refers to one statute exempting cotton from taxation in the possession of *producers. Brief for Amicus* at 80. Allenberg, of course, is not a producer. The relevancy of Allenberg's tax liability to the state is not in issue; what is important is the fact that many aspects of its business *are* constitutionally susceptable to the state's taxing power.

Judge Smith, in *Cone Mills*, characterized Mississippi as a "cotton producing state." 369 F. Supp. at 436. This portion of his opinion *is* correct and again brings into play *Coe* v. *Errol* and the real economic issues raised here and by that case:

> It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. *If such were the rule in many States there would be nothing but the lands and the real estate to bear the taxes.* Some of the Western States produce very little except wheat and corn, most of which is intended for export; *and so of cotton in the Southern States. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the State. And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State.* [116 U.S. at 327-28. (Emphasis added.)]

Mississippi's economic interest in cotton is obvious. The instant case merits an opinion enunciating as a matter of constitutional principle that a state's power to require qualification is properly exercised when the activities of a foreign corporation are taxable. If such a decision is forthcoming, Mississippi will possess additional leverage to receive from companies such as Allenberg the quid pro quo of all tax revenue which can be constitutionally generated prior to the time this major resource enters the stream of commerce.

IV. QUALIFICATION AS AN EXERTION OF REGULATORY POWER

Judge Smith's opinion in *Cone Mills* (and opposing counsel here) alludes to an exercise of the state's regulatory power in the context of Mississippi's qualification requirements. An initial review of the present status of qualification in the United States places the Mississippi requirements in an appropriate light for review as a regulatory measure.

A. Foreign Corporations and State Qualification Statutes

Bank of Augusta v. *Earle*, 38 U.S. (13 Pet.) 519, and its progeny placed a residuum of power within the states to control and regulate foreign corporations.[32] Initial hostility directed by the states against all outsiders[33] has long since dissipated. Possibly for the same political and economic reasons relating to the abandonment of

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[32] The traditional theoretical basis for permitting states to regulate the commercial affairs of a foreign corporation carrying on business within their borders is derived from decisions holding that, as the corporation has legal existence only in the state of its incorporation, Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, and is not a citizen within the meaning of the privileges and immunities clause, *e.g.*, Asbury Hosp. v. Cass County, 326 U.S. 207, 210-11, Paul v. Virginia, 75 U.S. (8 Wall.) 168, 178, a state may exclude foreign corporations from engaging in local (intrastate) business. Railway Express Agency v. Virginia, 282 U.S. 440. Thus, subject to restrictions on imposing unconstitutional conditions for entry, Terrel v. Burke Const. Co., 257 U.S. 529 (waiving recourse to sue in federal court) and extension of exclusionary and/or licensing statutes to foreign corporations engaged exclusively in interstate commerce, Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1, 12; Dahnke-Walker Milling Co. v. Bondurant, 267 U.S. 282, a state may choose to admit corporations on whatever conditions it may deem appropriate.

[33] "[T]here is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one State, their corporate powers and franchises could be exercised in other States without restriction, it is easy to see that the advantages thus possessed, the most important businesses of those States would soon pass into their hands. The principal business of every State would, in fact, be controlled by corporations created by other States." Paul v. Virginia, 75 U.S. (8 Wall.) 168, 181-2. See also, Isaacs, *An Analysis of Doing Business*, 25 COLUM. L. REV. 1018 (1925).

strong regulatory exercises by many domicilliary states,[34] entrance into the marketplaces of a majority of states is —for all intents and purposes—unrestricted and not laden with any barriers designed to curtail the economic growth that necessarily accompanies increased business activity.[35]

The thirty-four states adopting the Model Business Act[36] fit well within this analysis. The Act, while described as expressly not designed to attract local incorporation business,[37] provides that nothing therein shall be construed to "regulate the organization or internal affairs of foreign corporations." 2 ABA-ALI MODEL BUS. CORP. ACT. ANN. § 106 (1971), as adopted, MISS. CODE ANN. § 79-3-211 (1972). The only major restriction placed on qualifying corporations is the prohibition against exercising powers in excess of those granted domestic corporations. MISS. CODE ANN § 29-3-213 (1972). This complete absence of regulatory provisions leads some authorities to conclude

[34] For a recent commentary detailing the "Delaware experience" and the development of "enabling acts" for purposes of incorporation, see Kaplan, *Foreign Corporations & Local Corporate Policy*, 21 VAND. L. REV. 433 (1968). See also Note, *Foreign Corporations—State Boundaries For National Business*, 59 YALE L. J. 737 (1950).

[35] A prime example of the exception is New York. Provisions of the New York Business Corporation Law exert *detailed* regulatory powers over the "internal affairs" of foreign corporations. See N.Y. BUS. CORP. LAW §§ 1315-19 (1963); Note, *Corporations: Domestic Regulation of Foreign Corporations: Concept of "Domiciled Foreign Corporations:" New York Business Corporation Law of 1961*, 47 CORN. L.Q. 273 (1961).

[36] A total of twelve states have provisions identical to the Act. Twenty-two are "substantially similar." 2 MODEL BUSINESS CORPORATION ACT ¶ 3.0,-.02 (1971) (Supp. 1973).

[37] *See* Garrett, *Preface to 1950 Revision, Model Business Corporation Act*, HANDBOOK A. COMMITTEE ON CONTINUING LEGAL EDUCATION, AMERICAN LAW INSTITUTE, iv-x. *But see* Harris, *The Model Business Corporation Act; Invitation to Irresponsibility?*, 50 N.W.U.L. REV. 1 (1955)

that it encourages incorporation *outside* Model Act jurisdictions to *avoid regulation* by those states. HENN, CORPORATIONS & OTHER BUSINESS ENTERPRISES § 99 (1961); Note, *Corporations: Domestic Regulation of Foreign Corporations: Concept of "Domiciled Foreign Corporation:" New York Business Corporation Law of 1961*, 47 CORN. L.Q. 273, 274 n. 3 (1961).

B. Requirements Imposed by Mississippi

The typical analysis of qualification excludes regulation, *e.g.*, "qualification generally involves [1] the payment of a fee, [2] the submission of data . . . and [3] the appointment of a resident agent . . . ." Note, *Sanctions for Failure to Comply With Corporate Qualification Statutes: An Evaluation*, 63 COLUM. L. REV. 117 (1963). Similarly, the *major* requirements of the Mississippi Code relating to qualification require the *giving of information*[38] concerning corporate existence, powers and business to be done in the state. These include corporate name,[39] date of incorporation,[40] addresses of principal and registered office in the state (and agent therein),[41] purposes of the business,[42]

[38] This is in accord with the comments from the Model Business Act, concluding that it is designed: "(1) to place foreign corporations under the supervision of the state and protect its citizens in their transactions with such corporations; (2) to subject them to inspection so that conditions, standing and solvency may be known; (3) to put them in a state of equality with domestic corporations with respect to information required to be furnished; (4) to facilitate their subject to jurisdiction of the state's courts; and (5) to provide readily accessible evidence of the foreign corporation's existence." MODEL BUSINESS CORPORATION ACT ANN. § 112 ¶ 2 (1971).

[39] MISS. CODE ANN. § 79-3-219 (a) (b) (1972). See also MISS. CODE ANN. § 79-3-215(c) (power to reject if similar to domestic corporation).

[40] MISS. CODE ANN. § 79-3-219 (c) (1972).

[41] MISS. CODE ANN. § 79-3-219 (d) (e) (1972).

[42] MISS. CODE ANN. § 79-3-219 (f) (1972).

names of directors and officers,[43] number of shares authorized and issued,[44] corporate capital,[45] and, as previously noted, the estimated value of business to be done and capital committed in the state.[46] After payment of a filing fee ranging from $25 to $500 (similarly applicable to domestic corporations and scaled to the size of the corporation),[47] the Code mandates that the secretary of state "*shall*" issue the requested certificate. Miss. Code Ann. § 79-3-221 (1972).[48]

Subsequent to issuance of the certificate, annual and supplemental filings of similar information are required[49] The *sole statutory ground* for revocation of a certificate (other than failure to pay fees or appoint an agent for service) relates to noncompliance with these informational provisions.[50] In order to insure that correct information

[43] Miss. Code Ann. § 79-3-219 (g) (1972).

[44] Miss. Code Ann. § 79-3-219 (h) (i) (1972).

[45] Miss. Code Ann. § 79-3-219 (j) (1972).

[46] Miss. Code Ann. § 79-3-219 (k) (1972).

[47] Miss. Code Ann. § 79-3-255 (1972). Fees are based on capital stock, the charge of $25 beginning for corporations having $5,000 and under and $2 for each additional $1,000 with a maximum of $500 prescribed. *Ibid.*

[48] A general appeal provision exists to protect against the arbitrary failure of the secretary to comply with these mandatory provisions. See Miss. Code Ann. § 79-3-273 (1972).

[49] Miss. Code Ann. §§ 79-3-249-50 (1972) (annual reports); 231 (amendments to articles of incorporation); 233 (information as to mergers); 235 (changes of name or purposes); 227 (change in registered office or agent).

[50] "The certificate of authority of a foreign corporation to transact business in this state may be revoked by the secretary of state . . . when:

(a) The corporation has failed to file its annual report . . .

(c) The corporation has failed, after change of its registered

has been given by qualified corporations the secretary also possesses the power to issue interrogatories to enable him to ascertain compliance. Miss. Code Ann. § 79-3-265-267 (1972).[51]

With respect to the withdrawal process, the secretary of state is under statutory mandate to secure the following information:

> Such additional *information* as may be necessary or appropriate in order to enable [him] . . . to determine and assess any unpaid fees payable by such foreign corporation . . . *and a certificate from the state tax commission that the foreign corporation owes no sales taxes.* [Miss. Code Ann. § 79-3-237 (i) (Emphasis added.)]

Finally, the informational thrust of qualification is reflected by penalties for doing business in the state without first securing a certificate of authority. After directing that no action may be brought by such corporations in state courts, the Code imposes penalties including the amount of fees due from the corporation if it had qualified at the appropriate time "and thereafter filed all *reports* required by this chapter." Miss. Code Ann. § 79-3-247 (1972) (Emphasis added.)

office or registered agent, to file in the office of the secretary of state a statement of such change . . .

(d) The corporation has failed to file . . . any amendment to its articles of incorporation or any articles of merger . . .

(e) A misrepresentation has been made as to any material matter . . . ." Miss. Code Ann. § 79-3-241 (1972).

[51] Statutory authorization is also given for the inspection of books when the secretary of state and the attorney general "both believe upon probable cause" that a corporation "is or has engaged in any illegal stock manipulation, scheme or artifice to defraud . . . ." Miss. Code Ann. § 79-3-271. This information, of course, relates to enforcement of the state's Securities laws. See Mississippi v. Dare to be Great, Inc. (Cir. Ct. Hinds County 1974) (unreported opinion).

C. State Regulation & Union Brokerage v. Jensen

For purposes of determining intrastate commerce in the context of an exertion of regulatory powers the same "mechanical test" alluded to in *Kosydar* is applicable. As described in *Parker* v. *Brown*, 317 U.S. 341, 360-61:

> In applying the mechanical test to determine when interstate commerce begins and ends (see *Federal Compress* v. *McLean* . . . .) this Court has frequently held that for purposes of local *taxation* and *regulation* "manufacture" is not interstate commerce even though the manufacturing process is of slight extent. *Crescent Oil Co.* v. *Mississippi*, 257 U.S. 129 [upholding statute prohibiting certain corporations from operating cotton gins] . . . . And such regulation of manufacture have been sustained where, aimed at matters of local concern, they had the effect of preventing commerce in the regulated article. *Kidd* v. *Pearson*, 128 U.S. 1 . . . . *And no case has gone so far as to hold that a state could not license or otherwise regulate the sale of articles within the state because the buyer, after processing and packing them, will, in the normal course of business, sell and ship them in interstate commerce.* (Emphasis added.)

The power to "license" (now in the regulatory sense) is affirmed. Allenberg, as a foreign corporation having sole ownership and control over cotton prior to its insertion into interstate commerce (a common mass of property in the state) can therefore be subjected to plenary regulatory power, *albeit* not to the extent of forcing the company to construct facilities to compress and store the raw material (absent a showing of a valid local concern). *Pike* v. *Bruce Church*, 397 U.S. 137. Cases involving *direct* exercises of regulatory power are, however, inapplicable. Any analysis of state qualification statutes in a regulatory context begins and ends with the case preceeding *Eli Lilly: Union Brokerage Co.* v. *Jensen*, 322 U.S. 202.

Suit was brought by the company for breach of fiduciary relations. The defense was failure to qualify under pro-

visions similar to those found in the Mississippi Code. As described:

> The [Minnesota Act] . . . requires a certificate of any foreign corporation doing business in the State as a prerequisite for maintaining an action in a court of that State. In addition to a filing of five dollars an initial license fee of fifty dollars is exacted on making application for a certificate of authority . . . . Such an application must contain the name of the corporation, its home state or country, the address of its principal office and that of its proposed registered office in Minnesota, the names and addresses of its directors and officers, a statement of its aggregate number of authorized shares and kindred information . . . . The applicant must furthermore consent to the service of process upon it and appoint an agent upon whom service can be made . . . A foreign corporation doing business in Minnesota without a certificate of authority is subject to a penalty not exceeding $1,000 and "an additional penalty not exceeding $100 for each month or fraction thereof during which it shall continue to transact business in this state without a certificate of authority." . . . Having obtained such a certificate, the corporation is required to file annual reports on the basis of which an annual fee is assessed. The measure of the fee is substantially the same as that set for domestic corporations but in its computation the property and gross receipts of a foreign corporation are allocated between those derived from within and those derived from without Minnesota. . . . [322 U.S. at 206-07.]

In sustaining these provisions as applied to Union Brokerage, Mr. Justice Frankfurter wrote for a unanimous Court. The holding is specific: Although the primary business of the company was solely foreign commerce (facilitating imports and exports) incidental activities of purchasing materials and services from people in the state sufficiently "localized" the business for qualification purposes. To this extent *Lilly* and *Union Brokerage* are compatible, *i.e.*, while Lilly's entire business was obviously

not "localized" in New Jersey, its activity within the state —which included promoting and occasionally participating in intrastate sales—can be characterized within the *Union Brokerage* framework as "localized" interstate commerce.[52]

Mr. Justice Frankfurter, however, eschews any reliance on taxing cases, 322 U.S. at 207, and proceeds to analyze qualification as a constitutional exercise of regulator power. He initially notes:

> The information here sought of all foreign corporations by Minnesota as a basis for granting them certificates to do business within her borders is a conventional means of assuring responsibility and fair dealing on the part of foreign corporations coming into a State. [322 U.S. at 210.]

Continuing,

> The business of Union, we have seen, is localized in Minnesota, and Minnesota in the requirement before us, merely seeks to regularize its conduct . . . . In the absence of applicable federal regulation, a State may impose nondiscriminatory regulations on those engaged in foreign commerce "for the purpose of insuring the public safety and convenience; . . . . a license fee no larger than is reasonably required to defray the expense of administering the regulations may be demanded." . . . The Commerce Clause does not deprive Minnesota of the power to protect the special interest that has been brought into play by Union's localized pursuit of its share in the comprehensive process of foreign commerce. To deny the States the power to protect such special interests when Congress has not seen fit to exert its own legislative power would be to give an immunity to detached aspects of commerce unrelated to the objectives of the Commerce . . . . [Indeed that Clause does not] preclude a State from giving needful protection to its citizens in the course of their contacts with businesses conducted by outsiders *when the legislation by which this is accomplished is general in its scope, is not aimed at interstate or foreign commerce, and involves merely burdens incident to effective administration.* [322 U.S. at 211, 212. (Emphasis added.)]

[52] *Lilly* and *Union Brokerage*, as the instant case, also involved causes of action "separable" from interstate and foreign commerce.

D. Union Brokerage and the Applicability of the Mississippi Business Code to Allenberg

The requirements imposed by Mr. Justice Frankfurter with respect to "localized" business are again met by Allenberg: (1) employing agents on a commission basis in the state; (2) contracts with Mississippi farmers for sale and delivery of cotton to points within the state; and (3) further contracts with businesses such as the Federal Compress and Warehouse in Marks for storage and delivery of its cotton to common carriers for interstate shipment.[53] A sufficient nexus (in the terminology of Justice Frankfurter) exists for the application of a regulatory scheme "general in its scope . . . not aimed at interstate or foreign commerce [and involving] . . . merely burdens incident to effective administration."

There are no significant differences between the Mississippi Code and those provisions at issue in *Union Brokerage*. The Code mandates qualification to be a nondiscretionary function of the secretary of state. Qualification fees, following the suggestion of the Model Business Act[54] are cumulatively lower,[55] nondiscriminatory and reasonably adapted "to defray the expense of" administra-

[53] "The actual picking out of the bales of cotton, tagging and marking them for shipment, loading the bales into cars and taking out the bill of lading are functions performed by the warehouseman *at the direction of the cotton merchant.*" Appellant, *Brief on the Merits* 12. (Emphasis added.)

[54] MODEL BUSINESS CORP. ACT ANN. § 112 (1972).

[55] The Minnesota Act incorporated, "annual fee" requirements. This type of provision is not found in the Mississippi Code.

tion. 322 U.S. at 211. As such, the Code meets all the criteria of a regulatory scheme limited solely to the gathering of information, to-wit:

> However, a [normal] qualification statute . . . is neither a revenue measure nor a means to exclude foreign business. *Where authorization is automatic* upon application, and qualification does not extend privilege tax liability, *the qualification statute becomes in reality a regulatory measure, the purpose of which is to provide information* . . . . [Comment, *The Lilly Case: Dictum, Holding, & Finding*, 57 N.W. U.L. REV. 306, 321 (1962) (Emphasis added.)]

Not raised in the courts below nor posed as a "question presented" are arguments by Appellant and *Amicus* revealing yet another conflict with the qualification process: incurring "undue burdens." This, in turn, is coupled with a parallel argument that *International Shoe* and its offspring make requirements for appointment of agents for service of process illogical.[56]

The *Harvard Law Review*, reflecting on *Lilly* and state qualification requirements in general, concludes that they do have some "*informational* value to the state, and such little effort is normally required to comply with these statutes, that even their cumulative effect is not overly burdensome." 75 HARV. L. REV. 138, 140 (1962) (Emphasis

[56] Reliance is also placed on Judge Smith's conclusion in *Cone Mills* that the primary purpose behind qualification is the requirement of appointment of an agent for service of process. 369 F.Supp. at 431. This, again is incorrect. The Mississippi Supreme Court concludes with respect to qualification: "[I]f a foreign corporation engages in business in this state, it must bear its share of responsibilities as a corporate citizen the same as a domestic corporation." Trane Co. v. Taylor, 295 S.2d, 74[illegible], 750. See also note 38 *supra*, detailing the purposes of the Model Business Act.

added.) The Note also turns to the issue of agents for service of process:

> Even though a state may now, on the basis of "minimum contacts" assert jurisdiction without the corporation's actual consent, the requirement of an agent eliminates both the uncertainty of that standard and the possibility of litigation to determine whether the standard has been satisfied. [*Id.* at 140.]

A plain reading of the Mississippi Code indicates that its provisions meet those contemplated by Mr. Justice Frankfurter in *Union Brokerage*. Regulation, in the classic sense, is not involved. Rather, the detailed and intensive effort put into the Model Business Act insures that the "burdens incurred" are finely attuned to the informational interests of the state and purely incident to effective administration; *albeit* interpreted by some as providing the incentive for corporations to leave such states and re-enter as "foreign" corporations to avoid *regulation* as domestic entities. If considered an exercise of power in excess of that found in *Union Brokerage*, the distinct intrastate nature of Allenberg's activities mandate that the degree of "control" exercised does not exceed constitutional limits. Porter v. *Brown, supra.*

V. QUALIFICATION AND INTERSTATE COMMERCE

Crutcher v. *Kentucky*, 141 U.S. 47, established the basic proposition that qualification is to be assimilated with state licensing requirements and therefore any application to purely interstate commerce is an unconstitutional exercise of state power. The case arose in a time frame of state protectionist activity,[57] and in a factual context suitable for the period: criminal proceedings brought against an agent of an unlicensed express company under a qualification statute requiring, among other things, certification of working capital in excess of $150,000. Subsequent decisions (reaffirmed by *Lilly*) demonstrate that the Court considers all qualification statutes, regardless of differing bur-

[57] See section IV, note 33 and accompanying text.

dens imposed, as identical *vis-a-vis* their application to businesses engaged in interstate commerce.[58] Compare *International Textbook* v. *Peterson,* 218 U.S. 664 (minimal requirements of filing articles of incorporation; $25 filing fee; appointment of resident agent) *with International Textbook* v. *Pigg,* 217 U.S. 91 (extensive requirements including listing of all shareholders coupled with discretionary power to issue certificate); RESTATEMENT, CONFLICT OF LAWS § 175 (1934); 17 FLETCHER, CYCLOPEDIA CORPORATIONS § 8448, p. 504 (1960).

The lower court opinion in *Lilly* initially reviewed decisions expanding state regulatory and taxing powers into the arena of interstate commerce. *E.g., Southern Pac.* v. *Arizona,* 325 U.S. 761; *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450. After accepting the company's contention that purely "interstate commerce" was involved, the court utilized these cases to reject the argument that it was immune from qualification.[59] This Court by finding "localized" business activities affirmed on different grounds,[60] with Mr. Justice Harlan noting that

[58] Cases arising in this area defining the exception have usually dealt with enforcement of contracts made in interstate commerce. International Textbook v. Pigg, 217 U.S. 9; Sioux Remedy v. Cope, 235 U.S. 197; Dahnke-Walker Milling Co. v. Bondurant, *supra;* Furst v. Brewster, 282 U.S. 493; International Textbook v. Peterson, 218 U.S. 664. The only exception is Buck Stove v. Vickers, 226 U.S. 205, dealing with suit brought by a company engaged in interstate commerce to set aside a fraudulent conveyance.

[59] The court queried: "If the levying of an income tax on the business of a foreign corporation which is generated within the state is not a burden on interstate commerce, how can it be said that a simple regulatory statute, such as the cited sections of our Corporation Act, can impose a burden on interstate commerce." 57 N.J. Super. 291, 304, 154 A.2d 650, 657.

[60] But not without leaving some confusion in its wake. Previously, in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, the same activities at issue in *Lilly* had been found to constitute interstate commerce. The petition for rehearing relying on this point was denied.

the case was an inappropriate vehicle for a determination of whether "wholly interstate business" may be required to qualify. 366 U.S. at 284 n.1.

The instant case falls within the *Lilly* framework, *i.e.,* the factual setting presented by Allenberg fails to raise the issue of qualification as applied to interstate business. Strenuous arguments by Appellant and *Amicus,* however, do focus on the issue and therefore some short comment is in order. Hopefully, this commentary can assist to place the instant decision in an appropriate context of current arguments on the subject and raise an awareness of steps taken by other states to expand their powers with respect to qualification.

A substantial body of secondary authority concludes that the "interstate commerce exception" has outlived its usefulness.[61] The primary authority for such conclusions is dictum found in Mr. Justice Frankfurter's opinion in *Union Brokerage.* The decision quotes the trial court's finding in the case with approval:

> [T]he customhouse broker in clearing shipments "aids in the collection of customs duties and facilitates the free flow of commerce between a foreign country and the United States." [322 U.S. at 209.]

In this context, the conclusion:

> But the Commerce Clause does not cut the States off from all legislative relation to foreign and interstate

[61] 17 W. FLETCHER, CYCLOPEDIA CORPORATIONS § 6422, p. 387 (1960); G. HORNSTEIN, CORPORATION LAW & PRACTICE 53 (1959). See generally Note, *State Regulation of Foreign Corporations: Qualification; Interstate* v. *Intrastate Business: Eli Lilly & Co.* v. *Sav-On-Drugs, Inc.,* 47 CORN. L.Q. 300, 301-02 (1962). The latter article notes that Hawaii, apparently anticipating a change in the law, enacted a statute providing that a foreign corporation transacting solely interstate and foreign business could nevertheless be forced to qualify. HAWAII REV. LAWS § 174-2 (1955). This section was repealed and presently the statute is in accord with the general rule. HAWAII REV. STAT. § 418-7 (9) (1968).

commerce. South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177 . . . [322 U.S. at 209-10.]

This portion of the opinion has given birth to varying constitutional theories to inter the commerce clause exception.

A. Restatement of Conflicts

The second *Restatement of Conflicts*, adopts a "balancing" approach somewhat similar to that utilized for review of cases involving the exercise of taxing, service of process, and regulatory powers.[62] Specifically:

> *Corporations engaged solely in interstate or foreign commerce.* The fact that a corporation is engaged solely in interstate or foreign commerce does not prevent a State in which the corporation does business from subjecting it to some measure of control . . . .
>
> A State's power to require such a corporation to satisfy local qualification requirements depends both upon the character of these requirements and upon the quantum of the corporation's activity within the State. Nor can they be imposed as the price of permitting the corporation to engage in one or more isolated acts of interstate or foreign commerce within the State. When, however, the corporation does . . . a substantial portion of its business within the State it can be subjected to appropriate penalties such as inability to sue in local courts, for its failure to comply with reasonable qualification requirements. [Restatement, Second, Conflict of Laws § 311, pp. 337-8 (1971).]

[62] Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 460-2 ["interstate commerce is not immune] from carrying its fair share of costs of government . . . ."); Braniff Airways v. Nebraska, 347 U.S. 590, 601 ("Nebraska certainly affords protection during such [interstate airplane] stops and these regular landings are clearly a benefit to [the corporation] . . . ."); International Shoe Co. v. Washington, 326 U.S. 310, 319: "But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protections of [state] laws . . . [These activities] may give rise to obligations, and so far as those obligations arise out of . . . the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, be hardly said to be undue."

From the perspective of the benefit/burden dichotomy, the reasonableness of Mississippi's registration requirements have previously been described. Quite obviously, Allenberg meets the "quantum" of business activity test. In addition, the following benefits are and have been received by this company from the state:

(1) Access has been given to trade in the state's major agricultural commodity;

(2) Utilization of facilities throughout the state for compressing and classification of cotton;

(3) Utilization of these same facilities for warehousing pending shipment; and

(4) Protection afforded to cotton (while warehoused in Allenberg's name) by city and county police and fire departments.

The importance of these "benefits" to businesses such as Allenberg's cannot be underestimated. As they relate to a viable business structure and the profit incentive, they are critical to its present capability to carry on a business for profit. Quite obviously, that asked in return (qualification) is reasonable under the circumstances.

The Restatement's requirement of a certain "quantum" of corporate business in a state prior to the imposition of qualification requirements on interstate business—if adopted by the Court—could possibly assist to obviate the current inexplicable conflict presented by *Scripto, Inc.* v. *Carson*, 362 U.S. 207. *Lilly* draws the qualification line at the point of pure solicitation: *Robbins*. In *Scripto*, the Court utilized due process concepts (minimal contacts) and approved the utilization of a use tax in the "drummer" situation. Noted at the outset of the opinion were Florida's

statutory provisions designed to insure collection of the tax, 362 U.S. at 207 n.1:

> "Dealer" also means and includes every person who solicits business either by direct representatives, indirect representatives, manufacturers' agents, or by distribution of catalogs or other advertising matter or by any other means whatsoever and by reason thereof receives orders for tangible personal property from consumers, for use, consumption, distribution, and storage for use or consumption in the state . . . [FLA. STAT. ANN. § 212.06(g) (1971).]

Foreign "dealers", in addition to being required to appoint an agent for service of process, FLA. STAT. ANN. § 212.151 (1971), must also file a

> certificate of registration for each place of business, showing the names of interested persons in such business, their residence, the address of the business, and such other data as the department may reasonably require. The application shall be made to the department before the person, firm, copartnership, or corporation may engage in such business, and it shall be accompanied by a registration fee . . . [FLA. STAT. ANN. § 212.18(3) (1971).]

Failure to register brings into play the no-access penalty, to-wit:

> [A]nd no action either in law or equity on a sale or transaction as provided by the terms of this chapter may be had in this state by any such dealer unless it be affirmatively shown that the provisions of this chapter have been fully complied with. [FLA. STAT. ANN. § 212.06 (g) (1971).]

Lilly places Florida's ability to collect the use tax in jeopardy. If a change in the law is to occur the basic premise of the case; qualification is licensing which in turn implicitly assumes that interstate commerce cannot be carried on prior to qualification, must be rejected.

Ample authority exists for the proposition that a fee covering the administration of registration and supervision is not a tax. *Sprout* v. *City of South Bend*, 277 U.S. 163, 169. With respect to a direct prohibition against the carrying on of commerce: failure to qualify does not affect the validity of contracts entered into by a foreign corporation.[63] Rather, the state implicitly extends an invitation for foreign corporations to do all the business they desire without qualifying and it is only (1) at the point where a contract is breached; and (2) no other alternative exists for enforcement except utilization of the state's court system, that a penalty comes into play. Compare *Spector Motor Co.* v. *O'Connor*, 340 U.S. 602, *with Northwestern States Portland Cement, supra* at 462 (tax left to be collected by ordinary means). Presuming the occurrence of these interlocked events the corporation—if it desires—may still continue to do business without qualifying. Thus, only as a *secondary matter* is interstate commerce affected (presuming an interstate contract is sought to be enforced). Justice Holmes, in a long forgotten dictum in *Diamond Glue Co.* v. *United States Glue Co.*, 187 U.S. 611, 615, (intrastate contract, failure to qualify), pointed to this unique characteristic of qualification when he viewed the procedure as only a "conditional" rather than a direct or "absolute" prohibition. And so it should be viewed today.

B. Other Constitutional Grounds for Upholding Qualification for Interstate Businesses

Mr. Justice Harlan's concurrence in *Lilly* noted the similarities between qualification and decisions approving state regulatory statutes modeled to exercises of the police power directed at specific types of interstate businesses.

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[63] "The failure of a foreign corporation to obtain a certificate of authority to transact business in this state shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action, suit, or proceeding in any court of this state." MISS. CODE ANN. § 79-3-247 (1972).

California v. *Thompson*, 313 U.S. 109 (licensing transportation agents). See also *Robertson* v. *California*, 328 U.S. 440 (licensing sales of insurance in interstate commerce); *People* v. *Fairfax Family Fund, Inc.*, 235 C.A. 2d 881, 47 Cal. Reprt. 812, *appeal dismissed*, 382 U.S. 1 (regulating loans by mail). This analysis is possibly best applied to exertions of regulatory power over certain classifications of foreign corporations. See N.Y. Bus. Corp. Law § 1320 (1963) (more than 50 percent income derived from New York).[64] A more significant parallel to the approach utilized in *Union Brokerage* is found in *Fry Roofing Co.* v. *Wood*, 344 U.S. 57, sustaining a registration requirement for all contract carriers (as with all business for qualification). Justice Black, writing for the majority, found "no discretionary right to refuse to grant a permit" where the carriage was in interstate commerce. (344 U.S. at 161. Continuing:

> The state asserts no power or purpose to require the drivers to do more than register with the appropriate agency. Such an identification is necessary . . . in order that it may properly apply the state's valid police, welfare, and safety regulations to motor carriers using its highways. [*Ibid.*] [65]

Qualification statutes adopting the Model Act approach require information so that other state laws may be enforced. These meet the standards enunciated in *Fry Roofing*, and, of course, those in Union Brokerage. Hopefully, the instant case, though not specifically related to interstate commerce, can provide a format for a future extension of vitally needed state powers with respect to qualification.

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[64] For a discussion of the abortive concept of the "domiciled foreign corporation "which was included in the New York Business Corporation Act of 1961 and than removed, see Comment, 47 Corn. L.Q. 273 (1962).

[65] *Accord*, Duckworth v. Arkansas, 314 U.S. 390 (licenses for transporting liquor through state).

VI. JURISDICTION OF THE COURT

The most peculiar aspect of the case relates to the issue of jurisdiction. The Motion to Dismiss or Affirm sets forth the following:

(1) A federal question was not raised at trial or on appeal;

(2) Allenberg's raising of the federal questions via a petition for rehearing is insufficient to preserve the question for appeal to this court, *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 128; and

(3) The certificate secured from the Chief Justice of the Mississippi Supreme Court is deficient.

With respect to the last point, Appellee cited *Charleston Savings & Loan Ass'n* v. *Alderson*, 324 U.S. 182, 186 n.1, where the Court spoke directly to the certificate issue:

> The president of the Supreme Court of Appeals, in allowing the appeal to this Court, wrote a memorandum opinion to the effect that the question of the validity of the statute under the constitution was raised and decided there. Appellants urge that this indicates that the appeal is proper. While a certificate of state court made part of the record, to the effect that the Federal question in issue was decided there is *generally sufficient to sustain our jurisdiction when it is consistent with the record . . . a certificate to the same effect by the presiding justice of the state appellate court does not suffice, although it may serve to interpret indefinite and ambiguous evidence in the record, relied upon to show that the federal question was raised. . . .* The memorandum of the President of the West Virginia court was not sufficient of itself to establish that appellants attacked a statute below, nor does the record contain any evidence which could be relied upon to show that the validity of a statute was drawn into question. (Emphasis added.)

With no evidence in the record that Allenberg *raised* a *federal question, Alderson* indicates that even a certificate

signed by the full court on this point would have been insufficient. This basic procedural deficiency is recognized in the order of December 17, 1973:

> Consideration of the jurisdictional statement is deferred to accord counsel for appellant opportunity to secure a certificate as to whether the judgment was intended to rest on an adequate and independent state ground or on federal grounds. Charleston Federal Savings & Loan Association, et. al. v. Alderson, State Tax Commission . . . . [42 L.W. 3362 (Dec. 18, 1973.)]

If jurisdiction exists, it must therefore be based on the proposition that the lower court *assumed* a federal question was before it and proceeded to consider and dispose of that issue. R. Stern & E. Gressman, Supreme Court Practice § 3.28 (1969).

For a period in excess of two months Appellant *took no action* pursuant to this order, choosing instead to file a "Supplemental Brief" on February 23 reprinting Judge Orma Smith's opinion in *Cone Mills* and requesting reconsideration of the December 17 order. Now that the case is to be heard on the merits (pending a determination of jurisdiction) Appellant and *Amicus* produce lengthy arguments with respect to a federal question being raised and/or decided. The question is appropriately asked: if these arguments are valid why was not the simple step taken to complete the certificate heretofore signed by the Chief Justice by obtaining signatures of the other members of the panel participating in the decision below? The sequence of events smacks of "an intentional relinquishment or abandonment of a known right or privilege"; the classic definition of waiver. *Johnson* v. *Zerbst*, 304 U.S. 458, 464.

Because of the knowledgeable refusal by Appellant's counsel to take necessary steps to clarify the record, this Court is left with an ambiguous decision containing isolated references to "interstate commerce," by the lower court

interpreting a state statute and utilizing only state cases as precedent. With no federal question raised by Appellant below, the court was free to construe the statutory language as strictly or broadly as it pleased; free from review by this Court. *O'Neil* v. *Vermont*, 144 U.S. 323; *Department of Motor Vehicles* v. *Rios*, 410 U.S. 425. Thus, the situation is quite unlike a specific constitutional question argued and decided on the basis of state law, *Indiana* v. *Brand*, 303 U.S. 95, or federal statutory criteria specifically incorporated into a state statutory scheme.[66] *Flournoy* v. *Weiner*, 321 U.S. 253. Note, *Supreme Court Review of State Interpretations of Federal Law Incorporated by Reference*, 66 Harv. L. Rev. 1498 (1953). What is in issue is a decision possibly construing somewhat similar clauses, one federal and the other state and unless there are *strong indications* that federal law was utilized as a basis for decision, no jurisdiction is vested in this Court. *Minnesota* v. *National Tea Co.*, 309 U.S. 551. As recently explained:

> When the deciding court has written an opinion, inquiry into the existence of ambiguity focuses on that opinion. When the basis of the decision is not explicitly set forth therein, strong indications can nevertheless be derived from the general tenor and direction of the state court's discussion, as well as from the precedent on which the opinion appears to rely. Thus, when an opinion predicates the disposition entirely on federal law, the Court will reject a contention of possible nonfederal grounding. [Note, *Supreme Court Treatment of State Court Cases Exhibiting Ambiguous Grounds of Decision*, 62 Colum. L. Rev. 822, 832 (1962).]

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[66] Union Brokerage of course, rejects the concept of fixed constitutional criteria specifically incorporated into state qualification statutes. See Marcus v. J. R. Watkins Co., 188 So. 2d 543 (Ala. 1966): "doing business" for qualification purposes equated with *International Shoe* standards.

Accord, R STERN & E. GRESSMAN, *supra* at 127-28. The Court fully recognized this criteria when it requested a certificate on December 17. The record remains unchanged. The lower court opinion, by referring to the state statute involved and relying on state decisions must, with nothing more appearing, be presumed to rest on an adequate state ground. *New York* v. *Zimmerman*, 278 U.S. 63, 68. The record is therefore insufficient to give this Court jurisdiction.

VII. THE MOTION TO STRIKE

Appellee's Motion to Strike the brief filed by *Amicus* was not considered prior to the summer recess. In the interim, a letter addressed to the Clerk has been filed as a response. Alluding once more to what it perceives as a state interest in preventing "fraud," *Amicus* continues to speak of the "good faith" of Allenberg[67] and its right to blanket Ben Pittman and/or counsel with non-record characterization designed to show "bad faith" (at a minimum). The current allegation that opposing counsel is not the beneficiary of these remarks is irrelevent. *Henry* v. *Mississippi*, 379 U.S. 433 (on oral argument). This conclusion, however, is difficult to square with an indiscriminate use of the words "appellee" and "defendant" in the context of appearing "in this Court" with "the effrontery straight-facedly to urge . . . ." Similar insinuations exist in other allegations, the most regretable being those relating to prostitution of talents and/or being influenced by bribery or corrupt measures. Appellee requests that the Motion to Strike be decided with the merits of the case.

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[67] While the Motion is specifically directed towards scandalous material, certain portions of the brief in question fall well within other portions of Rule 40(5), *e.g.*, "burdensome [and] irrelevant." See, *e.g.*, *Brief for Amicus* 11-15; 16-19. This is especially true with respect to non-record commentary on Allenberg and its business relationships, profit margin, etc. *Ibid.*

VIII. CONCLUSION

For the reasons stated, it is respectfully submitted that the case be dismissed for want of jurisdiction, or, in the alternative, that the judgment of the Mississippi Supreme Court be affirmed.

Respectfully Submitted,

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APPENDIX A

§ 79-3-211. Admission of foreign corporation.

No foreign business corporation for profit shall have the right to transact business in this state until it shall have procured a certificate of authority so to do from the secretary of state. No foreign corporation shall be entitled to procure a certificate of authority under this chapter to transact in this state any business which a corporation organized under this chapter is not permitted to transact. A foreign business corporation for profit shall not be denied a certificate of authority by reason of the fact that the laws of the state or country under which such corporation is organized governing its organization and internal affairs differ from the laws of this state, and nothing in this chapter contained shall be construed to authorize this state to regulate the organization or the internal affairs of such corporation. No foreign non-profit non-share or non-profit or non-share corporation shall be entitled to procure a certificate of authority under this chapter.

Without excluding other activities which may not constitute transacting business in this state, a foreign corporation shall not be considered to be transacting business in this state, for the purposes of this chapter, by reason of carrying on in this state any one or more of the following activities:

(a) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes.

(b) Maintaining bank accounts.

(c) Maintaining offices or agencies for the transfer, exchange and registration of its securities, or appointing and maintaining trustees or depositaries with relation to its securities.

(d) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such

orders require acceptance without this state before becoming binding contracts.

(e) Transacting any business in interstate commerce.

(f) Conducting an isolated transaction completed within a period of thirty days and not in the course of a number of repeated transactions of like nature.

(g) Investing in or acquiring, in transactions outside of Mississippi, royalties and other non-operating mineral interests, and the execution of division orders, contracts of sale and other instruments incidental to the ownership of such non-operating mineral interests.

§ 79-3-213. Powers of foreign corporations.

A foreign corporation which shall have received a certificate of authority under this chapter shall, until a certificate of revocation or of withdrawal shall have been issued as provided in this chapter, enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued; and, except as in this chapter otherwise provided, shall be subject to the same duties, restrictions, penalties and liabilities now or hereafter imposed upon a domestic corporation of like character.

§ 79-3-215. Corporation name of foreign corporation.

No certificate of authority shall be issued to a foreign corporation unless the corporate name of such corporation:

(a) Shall contain the word "corporation," "company," "incorporated," or "limited," or shall contain an abbreviation of one of such words, or such corporation shall, for use in this state, add at the end of its name one of such words or an abbreviation thereof.

(b) Shall not contain any word or phase which indicates or implies that it is organized for any purpose other than

one or more of the purposes contained in its articles of incorporation.

(c) Shall not be the same as, or deceptively similar to, the name of any domestic corporation existing under the laws of this state or any foreign corporation authorized to transact business in this state, or a name the exclusive right to which is, at the time, reserved in the manner provided in this chapter, or the name of a corporation which has in effect a registration of its name as provided in this chapter.

§ 79-3-217. Change of name by foreign corporation.

Whenever a foreign corporation which is authorized to transact business in this state shall change its name to one under which a certificate of authority would not be granted to it on application therefor, the certificate of authority of such corporation shall be suspended and it shall not thereafter transact any business in this state until it has changed its name to a name which is available to it under the laws of this state.

Sources—Code, 1942, § 5309-224; Laws, 1962, ch. 235, § 109, eff from and after January 1, 1963.

Cross References—As to amendment of articles of incorporation generally, see § 79-3-115.

§ 79-3-219. Application for certificate of authority.

A foreign corporation, in order to procure a certificate of authority to transact business in this state, shall make application therefor to the secretary of state, which application shall set forth:

(a) The name of the corporation and the state or country under the laws of which it is incorporated.

(b) If the name of the corporation does not contain the word "corporation," "company," "incorporated," or

"limited," or does not contain an abbreviation of one of such words, then the name of the corpration with the word or abbreviation which it elects to add thereto for use in this state.

(c) The date of incorporation and the period of duration of the corporation.

(d) The address of the principal office of the corporation in the state or country under the laws of which it is incorporated.

(e) The address of the proposed registered office of the corporation in this state, and the name of its proposed registered agent in this state at such address.

(f) The purpose or purposes of the corporation which it proposes to pursue in the transaction of business in this state.

(g) The names and respective addresses of the directors and officers of the corporation.

(h) A statement of the aggregate number of shares which the corporation has authority to issue, itemized by classes, par value of shares, shares without par value, and series, if any, within a class.

(i) A statement of the aggregate number of issued shares itemized by classes, par value of shares, shares without par value, and series, if any, within a class.

(j) A statement, expressed in dollars, of the amount of stated capital of the corporation, as defined in this chapter.

(k) An estimate, expressed in dollars, of the value of all property to be owned by the corporation for the following year, wherever located, and an estimate of the value of the property of the corporation to be located within this state during such year, and an estimate, expressed in dollars, of the gross amount of business which will be transacted by the corporation during such year, and an estimate

of the gross amount thereof which will be transacted by the corporation at or from places of business in this state during such year.

(l) Such additional information as may be necessary or appropriate in order to enable the secretary of state to determine whether such corporation is entitled to a certificate of authority to transact business in this state and to determine and assess the fees payable as in this chapter prescribed.

Such application shall be made on forms prescribed and furnished by the secretary of state and shall be executed in duplicate by the corporation by its president or a vice-president and by its secretary or an assistant secretary, and verified by one of the officers signing such application.

§ 79-3-221. Filing of application for certificate of authority.

Duplicate originals of the application of the corporation for a certificate of authority shall be delivered to the secretary of state, together with a copy of its articles of incorporation and all amendments thereto, duly authenticated by the proper officer of the state or country under the laws of which it is incorporated.

If the secretary of state finds that such application conforms to law, he shall, when all fees have been paid as in this chapter prescribed:

(a) Endorse on each of such documents the word "Filed," and the month, day and year of the filing thereof.

(b) File in his office one of such duplicate orginals of the application and the copy of the articles of incorporation and amendments thereto.

(c) Issue a certificate of authority to transact business in this state to which he shall affix the other duplicate original application.

The certificate of authority, together with the duplicate original of the application affixed thereto by the secretary of state, shall be returned to the corporation or its representative.

§ 79-3-223. Effect of certificate of authority.

Upon the issuance of a certificate of authority by the secretary of state, the corporation shall be authorized to transact business in this state for those purposes set forth in its application, subject, however, to the right of this state to suspend or to revoke such authority as provided in this chapter.

§ 79-3-225. Registered office and registered agent of foreign corporation.

Each foreign corporation authorized to transact business in this state shall have and continuously maintain in this state:

(a) A registered office which may be, but need not be, the same as its place of business in this state.

(b) A registered agent, which agent may be either an individual resident in this state whose bsuiness office is identical with such registered office, or a domestic corporation, or a foreign corporation authorized to transact business in this state, having a business office identical with such registered office.

§ 79-3-227. Change of registered office or registered agent of foreign corporation.

A foreign corporation authorized to transact business in this state may change its registered office or change its registered agent, or both, upon filing in the office of the secretary of state a statement setting forth:

(a) The name of the corporation.

(b) The address of its then registered office.

(c) If the address of its registered office be changed, the address to which the registered office is to be changed.

(d) The name of its then registered agent.

(e) If its registered agent be changed, the name of its successor registered agent.

(f) That the address of its registered office and the address of the business office of its registered agent, as changed, will be identical.

(g) That such change was authorized by resolution duly adopted by its board of directors.

Such statement shall be executed by the corporation by its president or a vice-president, and verified by him, and delivered to the secretary of state. If the secretary of state finds that such statement conforms to the provisions of this chapter, he shall file such statement in his office, and upon such filing the change of address of the registered office, or the appointment of new registered agent, or both, as the case may be, shall become effective.

Any registered agent of a foreign corporation may resign as such agent upon filing a written notice thereof, executed in duplicate, with the secretary of state, who shall forthwith mail a copy thereof to the corporation at its principal office in the state or country under the laws of which it is incorporated. The appointment of such agent shall terminate upon the expiration of thirty (30) days after receipt of such notice by the secretary of state.

§ 79-3-229. Service of process on foreign corporation.

The registered agent so appointed by a foreign corporation authorized to transact business in this state shall be an agent of such corporation upon whom any process, notice or demand required or permitted by law to be served upon the corporation may be served.

If the registered agent be a corporation, service of process upon it as such agent may be made at its registered office in this state by service on the president, a vice-president, an assistant vice-president, the secretary or an assistant secretary of such registered agent.

Whenever a foreign corporation authorized to transact business in this state shall fail to appoint or maintain a registered agent in this state, or whenever any such registered agent cannot with reasonable diligence be found at the registered office, or whenever the certificate of authority of a foreign corporation shall be suspended or revoked, then the secretary of state shall be an agent of such corporation upon whom any such process, notice, or demand may be served. Service on the secretary of state of any such process, notice, or demand shall be made by delivering to and leaving with him, or with a person having charge of the corporation department of his office, two (2) true copies of such process, notice or demand and on payment of a fee of five dollars ($5.00). In the event any such process, notice or demand is served on the secretary of state, he shall immediately cause one of such copies thereof to be forwarded by registered mail, addressed to the corporation at its principal office in the state or country under the laws of which it is incorporated.

When service is had on the secretary of state, no judgment shall be taken in the case until thiry (30) days after the date of such service.

The secretary of state shall keep a record of all processes, notices and demands served upon him under this section, and shall record therein the time of such service and his action with reference thereto.

Nothing herein contained shall limit or affect the right to serve any process, notice or demand, required or permitted by law to be served upon a corporation in any other manner now or hereafter permitted by law.

§ 79-3-231. Amendments to articles of incorporation of foreign corporations.

Whenever the articles of incorporation of a foreign corporation authorized to transact business in this state are amended, such foreign corporation shall, within sixty (60) days after such amendment becomes effective, file in the office of the secretary of state a copy of such amendment duly authenticated by the proper officer of the state or country under the laws of which it is incorporated; but the filing thereof shall not of itself enlarge or alter the purpose or purposes which such corporation is authorized to pursue in the transaction of business in this state, nor authorize such corporation to transact business in this state under any other name than the name set forth in its certificate of authority.

§ 79-233. Merger of foreign corporation authorized to transact business in this state.

Whenever a foreign corporation authorized to transact busness in this state shall be a party to a statutory merger permitted by the laws of the state or country under the laws of which it is incorporated, and such corporation shall be the surviving corporation, it shall, within sixty (60) days after such merger becomes effective, file with the secretary of state a copy of the articles of merger duly authenticated by the proper officer of the state or country under the laws of which such statutory merger was effected; and it shall not be necessary for such corporation to procure either a new or amended certificate of authority to transact business in this state unless the name of such corporation be changed thereby or unless the corporation desires to pursue in this state other or additional purposes than those which it is then authorized to transact in this state.

§ 79-3-235. Amended certificate of authority.

A foreign corporation authorized to transact business in this state shall procure an amended certificate of authority in the event it changes its corporate name, or desires to pursue in this state other or additional purposes than those set forth in its prior application for a certificate of authority, by making application therefor to the secretary of state.

The requirements in respect to the form and contents of such application, the manner of its execution, the filing of duplicate

§ 79-3-237. Withdrawal of foreign corporation.

A foreign corporation authorized to transact business in this state may withdraw from this state upon procuring from the secretary of state a certificate of withdrawal. In order to procure such certificate of withdrawal, such foreign corporation shall deliver to the secretary of state an application for withdawal, which shall set forth:

(a) The name of the corporation and the state or country under the laws of which it is incorporated.

(b) That the corporation is not transacting business in this state.

(d) That the corporation revokes the authority of its registered agent in this state to accept service of process and consents that service of process in any action, suit or proceeding based upon any cause of action arising in this state during the time the corporation was authorized to transact business in this state may thereafter be made on such corporation by service thereof on the secretary of state.

(e) A post-office address to which the secretary of state may mail a copy of any process against the corporation that may be served on him.

(f) A statement of the aggregate number of shares which the corporation has authority to issue, itemized by classes, par value of shares, shares without par value, and series, if any, within a class, as of the date of such application.

(g) A statement of the aggregate number of issued shares, itemized by classes, par value of shares, shares without par value, and series, if any, within a class, as of the date of such application.

(h) A statement, expressed in dollars, of the amount of stated capital of the corporation, as of the date of such application.

(i) Such additional information as may be necessary or appropriate in order to enable the secretary of state to determine and assess any unpaid fees payable by such foreign corporation as in this chapter prescribed, and a certificate of the state tax commission that the foreign corporation owes no sales taxes.

The application for withdrawal shall be made on forms prescribed and furnished by the secretary of state and shall be executed by the corporation by its president or a vice-president and by its secretary or an assistant secretary, and verified by one of the officers signing the application, or, if the corporation is in the hands of a receiver or trustee, shall be executed on behalf of the corporation by such receiver or trustee and verified by him.

§ 79-3-239. Filing of application of withdrawal.

Duplicate originals of such application for withdrawal shall be delivered to the secretary of state. If the secretary of state finds that such application conforms to the provisions of this chapter, he shall, when all fees and sales taxes have been paid as by law prescribed:

(a) Endorse on each of such duplicate originals the word "Filed," and the month, day and year of the filing thereof.

(b) File one of such duplicate originals in his office.

(c) Issue a certificate of withdrawal to which he shall affix the other duplicate original.

The certificate of withdrawal, together with the duplicate original of the application for withdrawal affixed thereto by the secretary of state, shall be returned to the corporation or its representative. Upon the issuance of such certificate of withdrawal, the authority of the corporation to transact business in this state shall cease.

§ 79-3-241. Revocation of certificate of authority.

The certificate of authority of a foreign corporation to transact business in this state may be revoked by the secretary of state upon the condtions prescribed in this section when:

(a) The corporation has failed to file its annual report within the time required by this chapter, or has failed to pay any fees prescribed by this chapter when they have become due and payable; or

(b) The corporation has failed to appoint and maintain a registered agent in this state as required by this chapter; or

(c) The corporation has failed, after change of its registered office or registered agent, to file in the office of the secretary of state a statement of such change as required by this chapter; or

(d) The corporation has failed to file in the office of the secretary of state any amendment to its articles of incorporation or any articles of merger within the time prescribed by this chapter; or

(e) A misrepresentation has been made of any material matter in any application, report, affidavit, or other document submitted by such corporation pursuant to this chapter.

No certificate of authority of a foreign corporation shall be revoked by the secretary of state unless (1) he shall have given the corporation not less than sixty (60) days' notice thereof by mail addressed to its registered office in this state, and (2) the corporation shall fail prior to revocation to file such annual report, or pay such fees, or file the required statement of change of registered agent or registered agent or registered office, or file such articles of amendment or articles of merger, or correct such misrepresentation.

§ 79-3-243. Issuance of certificate of revocation.

Upon revoking any such certificate of authority, the secretary of state shall:

(a) Issue a certificate of revocation in duplicate.

(b) File one of such certificates in his office.

(c) Mail to such corporation at its registered office in this state a notice of such revocation accompanied by one of such certificates.

Upon issuance of such certificate of revocation, the authority of the corporation to transact business in this state shall cease.

§ 79-3-245. Application to corporation heretofore authorized to transact business in this state.

Foreign corporations which are duly authorized to transact business in this state at the time this chapter takes effect, for a purpose or purposes, for which a corporation might secure such authority under this chapter, shall, subject to the limitations set forth in their respective certificates of authority, charters or articles of incorporation, be entitled to all the rights and privileges applicable to foreign corporations procuring certificates of authority to transact business in this state under this chapter, and from the time this chapter takes effect such corporations shall be

subject to all the limitations, restrictions, liabilities, and duties prescribed herein for foreign corporations procuring certificates of authority to transact business in this state under this chapter.

Each such corporation shall designate in its first annual report to be filed under this chapter its initial registered office and initial registered agent in this state. The resident agent for service of process on each such corporation on the effective date of this chapter shall become and be the registered agent of each such corporation until changed under the provisions of this chapter.

§ 79-3-247. Transacting business without certificate of authority.

No foreign corporation transacting busness in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state. Nor shall any action, suit or proceeding be maintained in any court of this state by any successor or assignee of such corporation on any right, claim or demand arising out of the transaction of business by such corporation in this state.

The failure of a foreign corporation to obtain a certificate of authority to transact business in this state shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action, suit or proceeding in any court of this state.

A foreign corporation which transacts business in this state without a certificate of authority shall be liable to this state, for the years or parts thereof during which it transacted business in this state without a certificate of authority, in an amount equal to all fees which would have been imposed by this chapter upon such corporation had it duly applied for and received a certificate of authority to transact business in this state as required by this

chapter and thereafter filed all reports required by this chapter, plus all penalties imposed by this chapter for failure to pay such fees. The attorney general shall bring proceedings to recover all amounts due this state under the provisions of this section.

§ 79-3-248. Annual report of domestic and foreign corporations.

Each domestic corporation, and each foreign corporation authorized to transact business in this state, shall file, within the time prescribed by this chapter, an auual report setting forth:

(a) The name of the corporation and the state or country under the laws of which it is incorporated.

(b) The address of the registered office of the corporation in this state, and the name of its registered agent in this state at such address, and, in case of a foreign corporation, the address of its principal office in the state or country under the laws of which it is incorporated.

(c) A brief statement of the character of the business in which the corporation is actually engaged in this state.

(d) The names and respective addresses of the directors and officers of the corporation.

(e) A statement of the aggregate number of shares which the corporation has authority to issue, itemized by classes, par value of shares, shares without par value, and series, if any, within a class.

(f) A statement of the aggregate number of issued shares, itemized by classes, par value of share, shares without par value, and series, if any, within a class.

(g) A statement, expressed in dollars, of the amount of stated capital of the corporation, as defined in this chapter.

Such annual report shall be made on forms prescribed and furnished by the secretary of state, and the informa-

tion therein contained shall be given as of the date of the execution of the report, except as to the information required by subparagraph (g) which shall be given as of the close of business on the thirty-first day of December next preceding the date herein provided for the filing of such report. It shall be executed by the corporation by its president, a vice-president, secretary, an assistant secretary, or treasurer, and certified under the signature of one (1) of the officers signing the report as being true and correct, or, if the corporation is in the hands of a receiver or truestee, it shall be executed and certified on behalf of the corporation by the receiver or trustee.

§ 79-3-251. Filing of annual report of domestic and foreign corporations.

Such anual report of a domestic or foreign corporation shall be delivered to the secretary of state between the first day of January and the fifteenth day of April of each year, provided, that for corporations doing business on the basis of a fiscal year, such annual report shall be so delivered within three and one-half (3½) months after the end of such fiscal year, and provided further, that for such corporations the period herein specified as ending on the fifteenth day of April shall mean the period ending three and one-half (3½) months after the end of such fiscal year, except that the first annual report of a domestic or foreign corporation shall be filed between the first day of January and the fifteenth day of April of the year next succeeding the calendar year in which its certificate of incorporation or its certificate of authority, as the case may be, was issued by the secretary of state. Proof to the satisfaction of the secretary of state that prior to the fifteenth day of April such report was deposited in the United States mail in a sealed envelope, properly addressed, with postage prepaid, shall be deemed a compliance with this requirement. If the secretary of state finds that such report conforms to the requirements of this chapter, he shall file the same.

If he finds that it does not so conform, he shall promptly return the same to the corporation for any necessary corrections, in which event the penalties hereinafter prescribed for failure to file such report within the time hereinabove provided shall not apply, if such report is corrected to conform to the requirements of this chapter and returned to the secretary of state in sufficient time to be filed prior to the fifteenth day of May of the year in which it is due, or four and one-half (4½) months after the end of the fiscal year for which it is due.

§ 79-3-253. Fees and charges to be collected by secretary of state.

The secretary of state shall charge and collect in accordance with the provisions of this chapter:

(a) Fees for filing documents and issuing certificates.

(b) Miscellaneous charges.

(c) License fees.

§ 79-3-255. Fees for filing documents and issuing certificates.

The secretary of state shall charge and collect for:

(a) Filing articles of incorporation and issuing a certificate of incorporation, with a capital stock of $5,000.00 or less, . . . $25.00.

(1) Same. All articles of incorporation in excess of $5,0000.00 shall be charged for at the rate of $25.00 for the first $5,000.00 of capital stock and $2.00 per $1,000.00 additional on each $1,000.00, or part thereof, in excess of said first $5,000.00, provided no fee shall be more than $500.00.

§ 79-3-257. Miscellaneous charges.

The secretary of state shall charge and collect:

(a) For furnishing a certified copy of any document, instrument, or paper relating to a corporation, sixty cents

(60c) per page and two dollars ($2.00) for the certificate and affixing the seal thereto, with a minimum charge of three dolars ($3.00).

(b) At the time of any service of process on him as resident agent of a corporation, five dollars ($5.00), which amount may be recovered as taxable cost by the party to the suit or action causing such service to be made if such party prevails in the suit or action.

§ 79-3-259. Penalties imposed upon corporations.

Each corporation, domestic or foreign, that fails or refuses to file its annual report for any year within the time prescribed by this chapter shall be subject to a penalty of ten dollars ($10.00). Such penalty shall be assessed by the secretary of state at the time of default in such filing. The amount of the penalty shall be separately stated in notice to the corporation with respect thereto.

Each corporation, domestic or foreign, that fails or refuses to answer truthfully and fully within the time prescribed by this chapter interrogatories propounded by the secretary of state in accordance with the provisions of this chapter, shall be deemed to be guilty of a misdemeanor and upon conviction thereof may be fined in any amount not exceeding five hundred dollars ($500.00).

§ 79-3-261. Penalties imposed upon officers and directors.

Each officer and director of a corporation, domestic or foreign, who fails or refuses within the time prescribed by this chapter to answer truthfully and fully interrogatories propounded to him by the secretary of state in accordance with the provisions of this chapter, or who signs any articles, statement, report, application or other document filed with the secretary of state which is known to such officer or director to be false in any material respect, shall be deemed to be guilty of a misdemeanor, and upon

conviction thereof may be fined in any amount not exceeding five hundred dollars ($500.00).

§ 79-3-263. Disposition of fees, charges and penalties collected by secretary of state.

All fees and charges to be collected by the secretary of state under the provisions of this chapter including the assessment and collection thereof of all penalties shall be paid into the general funds of the state treasury, less ten per cent (10%) as received thereof to be retained and used by the secretary of state as necessary expense to administer the provisions of this chapter as the secretary of state deems necessary.

§ 79-3-265. Interrogatories by secretary of state.

The secretary of state may propound to any corporation, domestic or foreign, subject to the provisions of this chapter, and to any officer or director thereof, such interrogatories as may be reasonably necessary and proper to enable him to ascertain whether such corporation has complied with all the provisions of this chapter applicable to such corporation. Such interrogatories shall be answered within thirty (30) days after the mailing thereof, or within such additional time as shall be fixed by the secretary of state, and the answers thereto shall be full and complete and shall be made in writing and under oath. If such interrogatories be directed to an individual they shall be answered by him, and if directed to a corporation they shall be answered by the president, vice-president, secretary or assistant secretary thereof. The secretary of state need not file any document to which such interrogatories relate until such interrogatories be answered as herein provided, and not then if the answers thereto disclose that such document is not in conformity with the provisions of this chapter. The secretary of state shall certify to the attorney general, for such action as the attorney general may deem

appropriate, all interrogatories and answers thereto which disclose a violation of any of the provisions of this chapter.

§ 79-3-267. Information disclosed by interrogatories.

Interrogatories propounded by the secretary of state and the answers thereto shall not be open to public inspection nor shall the secretary of state disclose any facts or information obtained therefrom except in so far as his official duty may require the same to be made public or in the event such interrogatories or the answers thereto are required for evidence in any criminal proceedings or in any other action by this state.

§ 79-3-269. Powers of secretary of state.

The secretary of state shall have the power and authority reasonably necessary to enable him to administer this chapter efficiently and to perform the duties therein imposed upon him.

§ 79-3-271. Inspection and examination of books and records—injunction.

The secretary of state (with the approval of the attorney general) is authorized to inspect and examine, on reasonable notice and at reasonable times and places the applicable books and records of a corporation, but only when he, and the attorney general, both believe upon probable cause that such corporation is or has engaged in any illegal stock manipulation, scheme or artifice to defraud, illegal concealment of information material to the rights of shareholders or any persons proposing to purchase securities of said corporation, or any illegal or fraudulent act or acts that would impair, defeat, deny or abridge any rights of the shareholders of such corporation. The secretary of state may request the attorney general to apply for an injunction to prevent any further wrongful acts of such corporation. Provided further, that such information obtained pursuant to any investigation by the secretary of state as provided

in this section shall not be a public record except insofar as his official duty may require the same to be made public or in the event such information is required for evidence in any criminal proceedings or in any part other action of this state.

§ 79-3-273. Appeal from secretary of state.

If the secretary shall fail to approve any articles of incorporation, amendment, merger, consolidation or dissolution, or any other document required by this chapter to be approved by the secretary of state before the same shall be filed in this office, he shall, within ten (10) days after the delivery thereof to him, give written notice of his disapproval to the person or corporation, domestic or foreign, delivering the same, specifying the reasons therefor. From such disapproval such person or corporation may appeal to the Chancery Court of the First Judicial District of Hinds County by filing with the clerk of such court a petition setting forth a copy of the articles or other document sought to be filed and a copy of the written disapproval thereof by the secretary of state; whereupon the matter shall be tried de novo by the court, and the court shall either sustain the action of the secretary of state or direct him to take such action as the court may deem proper.

If the secretary of state shall revoke the certificate of authority to transact business in this state of any foreign corporation, pursuant to the provisions of this chapter, such foreign corporation may likewise appeal to the Chancery Court of the First Judicial District of Hinds County, by filing with the clerk of such court a petition setting forth a copy of its certificate of authority to transact business in this state and a copy of the notice of revocation given by the secretary of state; whereupon the matter shall be tried de novo by the court, and the court shall either sustain the action of the secretary of state or direct him to take such action as the court may deem proper.

Appeals from all final orders and judgments entered by the chancery court under this section in review of any ruling or decision of the secretary of state may be taken as in other civil actions.

§ 79-3-275. Certificates and certified copies to be received in evidence.

All certificates issued by the secretary of state in accordance with the provisions of this chapter, and all copies of documents filed in his office in accordance with the provisions of this chapter when certified by him, shall be taken and received in all courts, public offices, and bodies as prima facie evidence of the facts therein stated. A certificate by the secretary of state under the seal of his office, as to the existence or non-existence of the facts relating to corporations shall be taken and received in all courts, public offices, and official bodies as prima facie evidence of the existence or non-existence of the facts therein stated.

§ 79-3-277. Forms to be furnished by secretary of state.

All reports required by this chapter to be filed in the office of the secretary of state shall be made on forms which shall be prescribed and furnished by the secretary of state. Forms for all other documents to be filed in the office of the secretary of state shall be furnished by the secretary of state on request therefor, but the use thereof, unless otherwise specifically prescribed in this chapter, shall not be mandatory.

§ 79-3-279. Greater voting requirements.

Whenever, with respect to any action to be taken by the shareholders of a corporation, the articles of incorporation require the vote or concurrence of the holders of a greater proportion of the shares, or of any class or series thereof, than required by this chapter with respect to such action, the provisions of the articles of incorporation shall control.

§ 79-3-281. Waiver of notice.

Whenever any notice is required to be given to any shareholder or director of a corporation under the provisions of this chapter or under the provisions of the articles of incorporation or bylaws of the corporation, a waiver thereof in writing signed by the person or persons entitled to such notice, whether before or after the time stated therein, shall be equivalent to the giving of such notice.

§ 79-3-283. Action by shareholders or directors without a meeting.

Any action required by this chapter to be taken at a meeting of the shareholders or of the directors, respectively, of a corporation, or any action which may be taken at a meeting of the shareholders or of the directors, may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all of the shareholders or by all of the directors entitled to vote with respect to the subject matter thereof.

Such consent shall have the same force and effect as a unanimous vote of shareholders or as a unanimous vote of directors and may be stated as such in any articles or document filed with the secretary of state under this chapter.

§ 79-3-285. Unauthorized assumption of corporate powers.

All persons who assume to act as a corporation without authority so to do shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof.

§ 79-3-287. Application to existing corporations.

The provisions of this chapter shall apply to all existing corporations for profit organized under any general law of this state providing for the organization of corporations

for a purpose or purposes for which a corporation might be organized under this chapter.

Each such corporation shall designate in its first annual report to be filed under this chapter its initial registered office and initial registered agent in this state. Any resident agent for service of process on any such corporation on the effective date of this chapter shall become and be the registered agent of any such corporation until changed under the provisions of this chapter. The domicile of each such corporation on the effective date of this chapter shall become and be the registered office of each such corporation until changed under the provisions of this chapter.

§ 79-3-289. Application to foreign and interstate commerce.

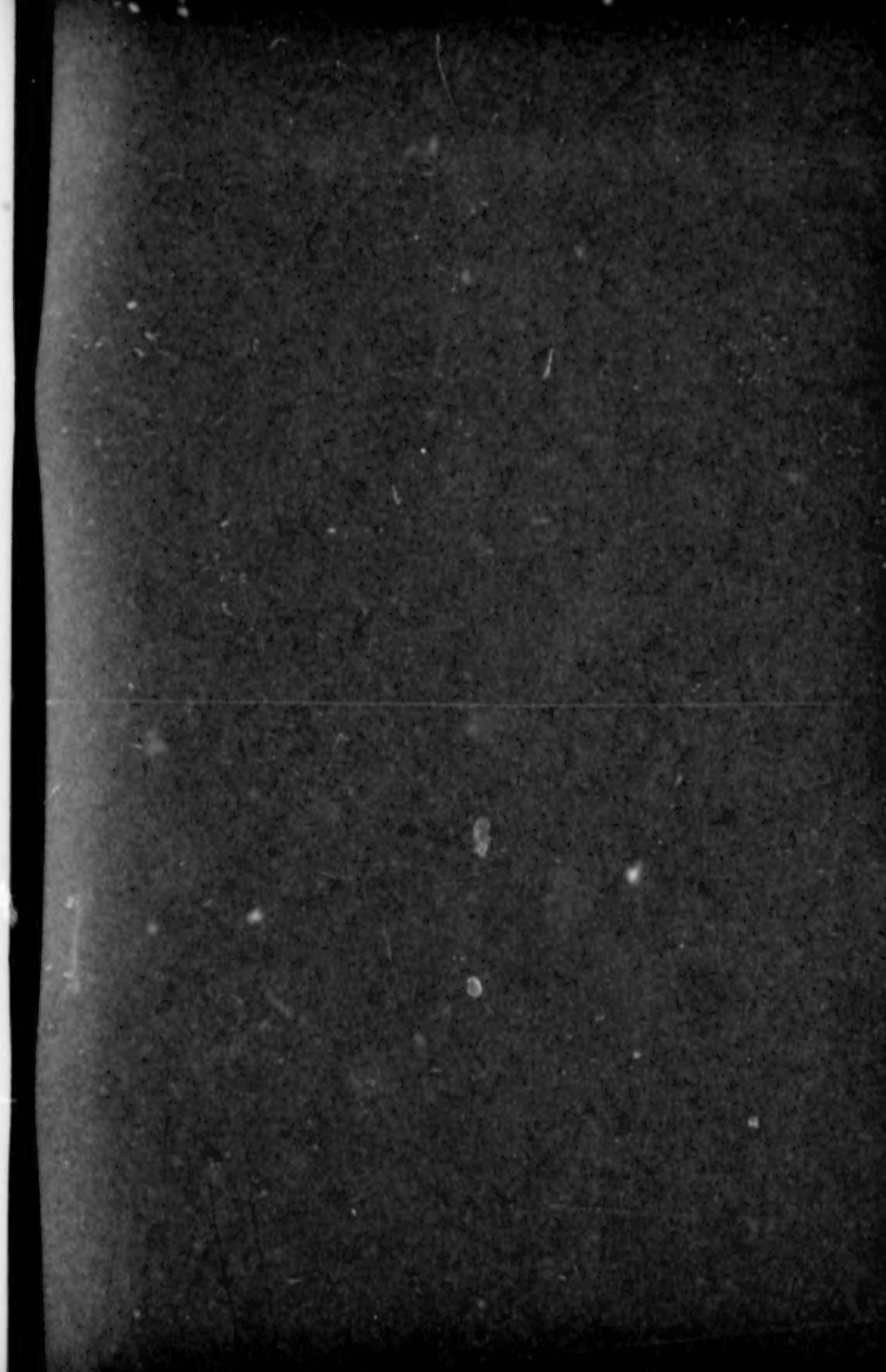
The provisions of this chapter shall apply to commerce with foreign nations and among the several states only in so far as the same may be permitted under the provisions of the Constitution of the United States.

§ 79-3-291. Effect of repeal of prior acts.

The repeal of a prior law by this chapter shall not affect any right accrued or established, or any liability or penalty incurred, under the provisions of such law prior to the repeal thereof.

§ 79-3-293. Effect on Mississippi Securities Law.

Nothing contained in this chapter shall be construed to amend, repeal or modify any provision of the Mississippi Securities Law, same being sections 75-71-1 to 75-71-57, Mississippi Code of 1972.



Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-628

ALLENBERG COTTON COMPANY, INC.,
Appellant,

v.

BEN B. PITTMAN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF FOR THE AMERICAN COTTON SHIPPERS ASSOCIATION AS AMICUS CURIAE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-628

ALLENBERG COTTON COMPANY, INC.,
Appellant,

v.

BEN E. PITTMAN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF FOR THE AMERICAN COTTON SHIPPERS ASSOCIATION AS AMICUS CURIAE

AUTHORITY TO FILE

This brief of the American Cotton Shippers Association as *amicus curiae* in support of the position of Appellant Allenberg Cotton Company is filed with the consent of the parties. This consent was received by telephone from Mr. George C. Cochran on behalf of Appellee Pittman and from Mr. John McQuiston II on behalf of Appellant Allenberg. Mr. Cochran and Mr. McQuiston agreed to furnish James F. Blumstein, counsel for *amicus*, written consent prior to the submission deadline, pursuant to Rule 42(2),

and such written approval will be filed with the Court upon receipt.

If such written consent does not arrive by the submission deadline, *amicus* requests that this be treated as a Motion for Leave to File, pursuant to Rule 42(3). The American Cotton Shippers Association submitted a brief as *amicus curiae* in support of Appellant's Jurisdictional Statement and wants to present its views on the merits to the Court on behalf of its members.

INTEREST OF THE AMERICAN COTTON SHIPPERS ASSOCIATION

The American Cotton Shippers Association is a trade association of cotton merchants, shippers and exporters of raw cotton. The association was founded in 1924 and is incorporated under the laws of the state of Tennessee. The association is authorized to cooperate and treat with Cotton Exchanges, Cotton Shippers Associations, Cotton Buyers Associations, Cotton Manufacturers Associations, Compresses, Gins and individuals in the United States and in any foreign country in evolving rules, regulations and practices governing the cotton trade which shall be fair to all concerned; and is authorized to engage in all such activities in connection with the cotton industry as come within the province of a trade association including the right to sue and be sued by the corporate name.

The 492 members of the association derive their status through membership in one of five federated associations, such associations doing business in sixteen states throughout the cotton belt:

Arkansas-Missouri Cotton Trade Association
Atlantic Cotton Association
Southern Cotton Association

Texas Cotton Association
Western Cotton Shippers Association

Of the total U.S. cotton crop the member firms handle over 70% of the raw cotton sold to domestic textile mills and export 80% of the U.S. crop sold in foreign markets. Four cooperative marketing associations and textile mill buyers control the remaining portions of these markets.

The involvement of members of this association in the purchase and sale of cotton directly involves them to a substantial degree in the transacting of business in interstate commerce. Any possible ruling that directly affects the continued orderly transacting of the business of the members of this association is a matter of concern to the American Cotton Shippers Association. Its interest in this case is therefore manifest, and it therefore requests leave of this Court to file this brief as *amicus curiae*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The lower court used statutory references to Mississippi Code 1942 Annotated, and *amicus* has used the same referencing. However, the Mississippi Code was recompiled and renumbered in the Mississippi Code 1972 Annotated. For the Court's convenience, *amicus* sets forth herein the corresponding reference sections, especially since the court in *Cone Mills Corp. v. Hurdle*, 369 F. Supp. 426 (N.D. Miss., 1974), an important intervening case, uses the 1972 Code numbering.

1942 Code (1972 Supp. where applicable)	1972 Code
§ 1437	§ 13-3-57
§ 5309-221(e)	§ 79-3-211(e)
§ 5309-225	§ 79-3-219
§ 5309-226	§ 79-3-221
§ 5309-230	§ 79-3-229
§ 5309-239	§ 79-3-247
§ 5309-312	§ 79-3-289
§ 5345	§ 79-1-27
§ 5346	§ 79-1-29
§ 9697(i)	§ 27-31-1(i)

STATEMENT OF THE CASE

The facts of this case are adequately detailed in Appellant's Jurisdictional Statement, pp. 3-12, and Appellant's Brief. *Amicus* will therefore refrain from restating the facts herein.

QUESTIONS PRESENTED

1. WHETHER THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL?

   a. WHETHER THE CERTIFICATE OBTAINED IS THAT OF THE MISSISSIPPI SUPREME COURT OR OF THE PRESIDING JUSTICE ONLY, AND IF OF THE COURT WHETHER IT IS CONCLUSIVE ON THIS COURT?

   b. WHETHER THE MISSISSIPPI QUALIFICATION STATUTE INCORPORATES THE FEDERAL CONSTITUTIONAL DEFINITION OF INTERSTATE COMMERCE, THEREFORE MAKING IT A HYBRID OF STATE AND FEDERAL LAW AND NECESSARILY RAISING THE FEDERAL QUESTION IN ITS CONSTRUCTION BY THE MISSISSIPPI SUPREME COURT?

   c. WHETHER IN VIEW OF THE CIRCUMSTANCES THE CONSTITUTIONAL QUESTION WAS EXPLICITLY RAISED IN A TIMELY MANNER UNDER THE RULE IN *MISSOURI EX REL. MISSOURI INSURANCE CO. V. GEHNER*, 281 U.S. 313 (1930) OR *CORN PRODUCTS REFINING CO. V. EDDY*, 249 U.S. 429 (1919)?

2. WHETHER THE TRANSACTION BETWEEN BUYER AND SELLER OF COTTON WAS IN OR AFFECTED INTERSTATE COMMERCE?

3. WHETHER, IF IN OR AFFECTING INTERSTATE COMMERCE, SUCH TRANSACTION NECESSARILY OR BY ITS EFFECT VIOLATED THE COMMERCE CLAUSE?

SUMMARY OF ARGUMENT

I. The Supreme Court Has Jurisdiction to Hear This Appeal

The law of federal jurisdiction concerns the distribution of power between the states and the federal government. Federal courts do not review federal questions that are not drawn in question in state courts because of fear that decision by the federal courts may intrude on state power to resolve state law questions. *Murdock v. City of Memphis*, 87 U.S. 590 (1875).

(a) But where a state court actually decides a federal question, it would be counterproductive and violative of the policy of federal-state comity if the federal courts questioned the propriety of the state court's reaching the federal question. That is a matter for the state courts themselves to resolve. Similarly, it is apparent that the federal courts should accept the statement of the state

court that it actually reviewed the federal question. The certificate is a device that has been used to clarify ambiguous records and opinions of state cases, but this Court has given the same deference to state court certificates that it has to state court opinions, and indeed to do otherwise would defeat the very reason for federal restraint.

In this case, counsel for Allenberg sought a certificate from the state supreme court, and the court issued such a certificate in language closely paralleling a certificate found in the leading Supreme Court practice book. While signed by the Presiding Justice, the certificate states that it is modifying the court's order to include the statement in the certificate. This Court should accept the certificate for what it says it is and for what counsel explicity sought —a certificate by the state court and not of a single justice. As a certificate of the court, it should be conclusive on this Court that the federal question was considered by the state supreme court.

(b) Mississippi law exempts transactions in "interstate commerce" from the general qualification requirement for foreign corporations. This exemption reflects a mandatory limitation on state power imposed by the Commerce Clause and therefore uses the federal concept as its own referent. The Mississippi statute therefore adopts and incorporates the federal meaning as a necessary element in construing its own statute. *See Cone Mills Corp. v. Hurdle*, 369 F.Supp. 426 (N.D. Miss. 1974). *Cf. United Air Lines v. Mahin*, 410 U.S. 623 (1973). When the Mississippi Supreme Court declined to apply the statutory exemption respecting transactions in interstate commerce to the transactions herein, it was necessarily making a determination that the statute was valid and that the federal Commerce Clause was no impediment to such application. *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942); *State Tax Commission v.*

Van Cott, 306 U.S. 511 (1939). *See Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States* §99 (Wolfson and Kurland ed. 1951); Greene, *Hybrid State Law in the Federal Courts*, 83 Harv. L. Rev. 289 (1969).

(c) In normal situations, a litigant must raise the federal question prior to the petition for rehearing. If, contrary to Appellant's contention, it be concluded that no federal question were presented or decided prior to the petition for rehearing, that would still be timely in the circumstances of this case. Under the doctrine of *Saunders v. Shaw*, 244 U.S. 317 (1917), and *Missouri ex rel. Missouri Insurance Co. v. Gehner*, 281 U.S. 313 (1930), a litigant is not required to anticipate deprivation of constitutional rights or to seek explicitly to protect them in advance of their actual deprivation. Allenberg won its lawsuit in the trial court, which found Allenberg exempt from the qualification requirement. It was the decision of the Mississippi Supreme Court that resulted in the actual infringement on federal Commerce Clause interests, and Appellant raised this point at the earliest time in the petition for rehearing. The federal question in such circumstances is timely raised. *Cf. Corn Products Refining Co. v. Eddy*, 249 U.S. 428, 432 (1919).

II. Application of the Qualification Requirement and the Penalty Sanction Violates the Commerce Clause.

(a) The underlying transaction herein is covered by the terms of *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921). In *Dahnke-Walker* a purchase was made by an agent of a foreign corporation in Kentucky for shipment to Tennessee. This Court held that the purchase as well as the actual transportation constituted interstate commerce and held invalid the state's qualification requirement in its application. Allenberg is a cotton merchant

whose business is the facilitation of interstate commerce in cotton. The market for cotton is worldwide, and it is universally recognized that the market for agricultural commodities most closely resembles the classical market structure. Congress has confirmed this reality and the national interest in maintaining a smooth operating and privately run market system in cotton. It has adopted in legislative findings the concept of commerce embodied in *Dahnke-Walker* and related cases that encompasses the negotiation, purchase, and sale as well as the actual transportation of the cotton out of state. The findings of Congress should be accorded great weight, and this Court should be very wary of interfering with a pattern of commercial development fostered by *Dahnke-Walker* and subsequent state and federal legislation adopting its concepts. *Cf. Flood v. Kuhn*, 407 U.S. 258 (1972).

(b) The nature of the Mississippi statutes as applied herein impermissibly intrude on the Commerce Clause. It is inconsistent with the free trade concept embodied in the Commerce Clause that a state be able to require a foreign corporation to secure a license to transact interstate commerce within its borders. Requiring a certificate of authority for interstate transactions manifests a restriction on interstate commerce at war with the precepts of a national marketplace and assured access to local markets for interstate commercial activities. *Dahnke-Walker* and its progeny state explicity that the nature of such a regulation violates the Commerce Clause.

Moreover, the statute is uneven in its application to Mississippi residents and to foreign corporations. Contracts entered into by foreign corporations are not void, but merely unenforceable by the foreign corporation. On the other hand, if a Mississippi resident seeks to maintain a bargain, he can sue on the contract. This is the kind

of parochialism that fosters retaliation and recrimination among states and undermines the free trade area foreseen by the Founding Fathers and certainly a major reason for our national prosperity today.

(c) The actual effect of the Mississippi statutes in their application herein is to unduly burden interstate commerce. The state's primary interest is in protecting its citizens against fraud by overreaching foreign corporations. The qualification requirements were designed to provide accountability to local citizens by establishing a basis for acquiring jurisdiction. *NAACP. v. Alabama*, 377 U.S. 288, 305 (1964); *Cone Mills Corp. v. Hurdle*, 369 F.Supp. at 431. But since *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), wherein the "minimum contacts" doctrine was formulated for purposes of allowing state jurisdiction over foreign corporations, all states have adopted long arm statutes. See Note, *Foreign Corporations—State Boundaries for National Business*, 59 Yale L.J. 737 (1959). Mississippi has a long arm statute and a specific provision for permitting service on local agents of foreign corporations. §§1437, 5346 Miss. Code 1942 Ann. Since Allenberg could easily have been served, the interests of the state are somewhat diminished.

Moreover, the Mississippi statute, unlike the Model Business Corporation Act from which it is adopted and unlike the vast majority of other states, requires that a foreign corporation have qualified at the time the contract is actually made in order for it to maintain an action in state court. This is obviously a severe penalty which can no longer be justified in light of modern rules of service of process and jurisdiction. See Note, *Foreign Corporations: The Interrelationship Between Jurisdiction and Qualification*, 33 Ind. L.J. 358 (1958). By absolutely barring foreign corporations from state courts, the Mississippi law also promotes

extra-judicial remedies of a kind frowned upon by this Court in *Mitchell v. W. T. Grant Co.*, 42 U.S.L.W. 4671, 4677 (U.S. May 13, 1974), and infringes on the foreign corporation's interest in access to a judicial form, an interest this Court recently has declared to be basic. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

The existence of alternatives which are less intrusive on the federal interstate commerce interest must be considered and balanced in determining whether application of a state statute will be held unduly burdensome on the Commerce Clause. *Pike v. Bruce Church*, 397 U.S. 137, 142; *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951). The existence of broad jurisdictional statutes and the possibility of a curative provision indicate that the state's interest is not sufficient when balanced against the overriding federal interest in the free flow of commerce.

(d) The commercial reliance on *Dahnke-Walker* and the specific equities in this case preclude modification or overruling of *Dahnke-Walker*. In *Flood v. Kuhn*, 407 U.S. 258 (1972), this Court indicated its unwillingness to interfere with commercial relationships that had developed in reliance upon a decision of this Court. Congressional and state legislation have reinforced the institutionalization of the doctrine of *Dahnke-Walker*, and modification of that rule would cause unwarranted commercial disruption in an area already too uncertain. *Cf. Kosydar v. National Cash Register Co.*, 42 U.S.L.W. 4767 (U.S. May 20, 1974) (need for a rule justified otherwise "mechanical" approach).

Moreover, in this particular case, affirming the judgment of the Mississippi Supreme Court would be the utmost in irony. A rule that is supported because of its prevention of fraud is used by a contract breacher to defeat an otherwise valid commercial obligation, freely bargained for and without any evidence of fraud on the part of the

foreign corporation. Allenberg and others similarly situated stand to lose thousands of dollars directly into the pockets of those who renege on "solemn contracts", *Cf. M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-13 (1972), and then justify their refusal to deliver under the mask of protecting Mississippians against fraud. This is casuistry of the first order; it seeks to justify refusal to enforce contracts for a broader good when the reality is that only Pittman will gain an unjustified windfall profit with this Court's sanction. This is, therefore, scarcely the case in which to reconsider basic doctrine.

PRELIMINARY STATEMENT

"When money speaks enticingly, listeners become litigants." *Cone Mills Corp. v. Hurdle*, 369 F.Supp. 426, 429 (N.D. Miss. 1974). These words, written by Federal District Judge Orma Smith in a cotton contract reneging case, sum up what has happened in this and all too many similar cases currently in litigation throughout the cotton-growing region. Judge Smith took judicial notice of his own docket to "observe that literally scores of suits have been filed to either enforce or rescind advance or forward contracts for the sale and delivery of cotton fiber." *Id.* The reasons for the massive impetus to break cotton contracts relate to market conditions and to the decision of the Mississippi Supreme Court now under review.

As Judge Smith found, the price of raw cotton fiber on world markets "rose in a sudden and spectacular fashion" in 1973. Weather conditions, unprecedented foreign and domestic demand, dollar devaluation, and related factors combined to cause the market price to more than double within a six month period. *Id.*

Because of this striking rise in the market price, some cotton growers have been unable to resist the corrupting

urge for immediate gain. Impelled by the short-sighted desire for windfall profits, and unmindful of the staggering consequences of contract breaching on other blameless parties, this defendant seeks to undermine a recently developed course of dealing that holds the promise of long-run stability for cotton producers and others in the cotton trade. By reneging on contractual obligations to deliver cotton at harvest time—agreements entered into at arm's length and freely bargained for—defendant, and others like him, threatens the economic welfare of an entire industry. Moreover, his action, if successful, may subvert recent federal government initiatives in promoting self-reliance in the cotton trade and increased exports to markets overseas. The failure of these governmental efforts naturally could have the most serious and widespread economic effects since all Americans share in the miseries brought on by runaway inflation and recurring balance of payments. The contribution of the agricultural sector is especially noteworthy, with the rising sales on international markets. *See* 1970 U.S. Code Cong. & Admin. News 4792.

Defendant's actions may have far-reaching consequences. Since the end of World War II, the United States Government has actively sought to improve marketing procedures for agricultural commodities. Congress has declared that "a sound, efficient, and privately operated system for distributing and marketing agricultural products is essential to a prosperous agriculture and is indispensable to the maintenance of full employment and to the welfare, prosperity, and health of the Nation." 7 U.S.C. §1621. Accordingly, Congress directed the Secretary of Agriculture to conduct programs "designed to eliminate artificial barriers to the free movement of agricultural products," 7 U.S.C. §1622 (d), and to foster new and expanded markets (domestic and foreign). 7 U.S.C. §1622(e). Unhappily,

however, for more than twenty-five years, cotton marketing was characterized by heavy reliance on governmental supports for crop surpluses. As Mr. Kenneth E. Frick, administrator of the U.S. Department of Agriculture's Agricultural Stablization and Conservation Service has stated, by acquiring and holding stocks of cotton at taxpayer expense for long periods of time in Commodity Credit Corporation (CCC) approved warehouses, the government has been performing an inventory function for the trade and has been serving as a market for farmers for more than a generation.

Guaranteed government price supports generated cotton surpluses stored in CCC warehouses. The government sought to curtail planting as part of its support program in order to reduce overall production. But in recent years, the surplus or carryover of cotton has diminished to the point where government sought to increase output. The government, consistent with its emphasis on a successful, privately operated market system, encouraged production by cotton farmers on acreage not subject to federal price supports. Cotton produced on other than allotted land, however, was grown at the farmer's own risk. The approach very clearly "put a greater reliance on the marketplace" and sought to "bring agriculture production in line with the demands of the marketplace" 1973 U.S. Code Cong. & Admin. News, p. 1757.

This program went into effect for the 1971 crop year, and before planting their crops many farmers sought a method for reducing this risk while at the same time assuring themselves additional, reasonable profits. As a means of protection against price declines from the increased production, especially since government supports would be unavailable for unallotted acreage, many farmers turned to a new type of contractual agreement, the "forward" contract.

> By forward contracting, a grower agrees to sell his future crop before it is planted or soon thereafter. A capable farmer can virtually assure himself a profit even before planting. If he is unable to negotiate a price which he anticipates will be profitable, he may plant other crops which are in demand or simply allow his land to lie fallow. Thus, in theory at least, forward contracting will help restore traditional principles of supply and demand to the cotton market with the added feature that the element of risk is reduced.
>
> The grower, moreover, can borrow on forward contracts and textile mills can price their finished product long before manufacture. Forward contracting also enables the retail merchant to determine the price of an article manufactured from cotton months in advance.

Cone Mills Corp. v. Hurdle, 369 F. Supp. at 430.

As the private market functions more smoothly, the need for constant federal government tinkering diminishes, the burden on taxpayers dwindles, and the Congressional goal of an efficient "privately operated" marketing system is more nearly attained. But the continued success of the forward contracting device depends on mutuality of trust and reliance on the strict adherence to contractual obligations. Realizing the desirability and importance of forward contracting for cotton growers, especially under the new farm law, 87 Stat. 221, cotton producer organizations have stressed that producers and merchants must be able to rely on each other's commitments if contracting is to succeed as a viable marketing tool. The demise of forward contracting because of reneging and unenforceability could even affect the level of U.S. exports since foreign countries seem to place great weight on the American reputation for fulfilling contractual responsibilities, or at least upholding contractual rights in court.

The financial consequences resulting from the mass refusals to deliver are severe enough, but consider also the possible impact on American foreign policy interests of judicial sanction for mass contract breaching. Suppose, for example, that the plaintiff in this situation were not an American corporation "foreign" to Mississippi, but instead a Japanese firm (a lot of cotton from Marks, Mississippi went to Japan, A-60) a mainlaind Chinese buyer, Korean, Dutch, or English purchaser. Imagine the international repercussions of allowing each state to interfere with enforcement of admittedly valid contracts by denying access to the legal process to good faith foreign purchasers. The ultimate embarrassment to the United States of such a situation is clear evidence of the wisdom of the traditional court-imposed limitations on state action in the field of interstate and foreign commerce.

In 1971, 11% of the United States upland (i.e., grown in the southeastern United States) cotton crop was forward contracted. The contract between Appellant Allenberg and Appellee Pittman was signed in January, 1971 and applied to Pittman's 1971 crop when harvested. During 1971, cotton prices rose, and by harvest time in November, 1971, the Pittman cotton was worth some $18,000 more than the contract price; Pittman refused to deliver.

In 1972, the practice of forward contracting became more widespread, with 32% of the United States upland cotton crop sold in advance of harvest. U.S. Dept. of Agriculture, ***August 1 (1973) Crop Report*** (Aug. 9, 1973) p.2. But the market for cotton declined during 1972 so that forward cotton contracts entered into in February, 1972, for example, brought an average price of 30.27 cents per pound while farmers who waited until harvest time in October, 1972, received an average price of 25.56 cents per pound. ***Statistics on Cotton Related Data 1930-1967, Supplement***

for 1972, U.S. Dept. of Agriculture Economic Research Service (Feb. 1973, Statistical Bulletin No. 417) p. 85. The 1972 experience evidently persuaded even more farmers to contract ahead for sale of their crop for over half the 1973 crop was forward contracted, with the percentage in the Delta region (including Mississippi) above 70%, U.S. Dept. of Agriculture, *Cotton Situation* (Nov. 1973), CS-263, p. 9.

The market price for cotton, as previously noted, skyrocketed in 1973. Prior to the harvest season, the Mississippi Supreme Court sent shock waves throughout the cotton-growing region when it decided the present case, reversing the trial court and holding that an out-of-state cotton broker could not enforce concededly valid forward cotton contracts. This decision and the 1973 market situation placed in jeopardy the validity of contracts for more than *one million* bales of cotton produced and forward contracted in Mississippi. Coming in April, the decision provided a basis for optimism among short-sighted and venial producers that they could renege on their freely bargained for, arms-length contracts, and rely on the assistance of the Mississippi courts to deny enforcement to foreign corporations which, relying on state law and direct Supreme Court precedent in *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921), had not obtained a certificate of authority to do business in Mississippi. Responsible producers and producer organizations, recognizing the importance of maintaining the viability of the forward contract and realizing the reliance placed on the contract price by others in the cotton trade, urged compliance with the contracts; but all too many farmers sought to capitalize on the short-run windfall opportunity, heedless of the harm caused the buyers in the near term and themselves in the long term if the forward contract technique became suspect.

The cotton program of the government for 1974 is based upon a 1973 change in the law. 87 Stat. 221. The new program places an even heavier emphasis on the use of the marketplace and further government withdrawal from direct subsidy, unless a specified target price for cotton is not achieved. A cornerstone of this policy is that farmers be able to forward contract so as to reduce their risk if they wish. The greater reliance on forward contracts is, thus, a pillar of federal policy. Yet, continued uncertainties about the validity of these contracts diminishes their value and popularity. If a foreign corporation not qualified to do business in Mississippi must run the risk of expensive litigation on a contract, it is unlikely to enter into one. Inevitably, this will place a considerable burden on those in the business to qualify in all cotton-producing states; but it will also keep out of the market foreign corporations unable or unwilling to qualify because the amount of business they do in a particular state does not warrant it. Or it could deter a new entrant into the marketplace (e.g. a Japanese corporation) from buying in a state.

The United States balance of payments situation can ill afford the imposition of insular qualification requirements on a state by state basis where the effect may well be reducing the ease with which prospective buyers enter the American agricultural marketplace. Moreover, imposition of state by state qualification requirements for interstate cotton transactions would allow highly capitalized and big-volume brokers and buyers to gain a protected position in the cotton market, with excessively concentrated power. This would inherently open up the opportunity for abuses, such as artificially controlled supply and lower prices for individual farmers, by limiting the number of potential purchasers of his produce.

Finally, it is important to understand precisely how the forward contract operates in an individual situation.

The Allenberg-Pittman transaction involved in this case adequately demonstrates the commercial consequences of a breach of contract. The most important point to bear in mind is that Allenberg stood to gain nothing from the improved market price for cotton between planting and harvest. Allenberg makes commitments to furnish cotton at a specified future time at a certain price. The terms of this commitment reflect the market situation at the time the contract is made. By the time of harvest, Allenberg has long since committed itself to delivering the cotton it has agreed to buy from farmers.

In reality, Allenberg is in the same situation as the farmer, having committed itself to sell at a low market price while the price went up. But Allenberg's contractual obligation must be met. If it cannot enforce its original contract with the farmer, then Allenberg must purchase spot cotton at the time it must deliver. The $18,000 price differential in this case comes directly out of Allenberg's pocket as a disruptive business loss. Quite on the contrary for Pittman, his planning and commitments, like Allenberg's, were all based on the lower price; enforcement of the Allenberg-Pittman contract will bring about no dislocation for Pittman as a result. This is therefore not a case of which party will benefit from a fortuitous rise in price—that is, among competing claimants for windfall gain. Rather, this is a case where one party (Pittman) seeks windfall profit by saddling the other party (Allenberg), which had already locked itself into a commitment based in good faith on the deal with Pittman, with substantial out of pocket, disruptive losses. Moreover, if the price of cotton had declined, the contract under Mississippi law would be entirely enforceable by Pittman against Allenberg. Miss. Code 1942 Ann. §5304-234. This is important background in understanding the commercial realities among the parties as well as the institutional interests in a "sound, efficient,

and privately operated system for distributing and marketing agricultural products . . . " 7 U.S.C. §1621.

ARGUMENT

I. THE COURT HAS JURISDICTION TO HEAR THIS APPEAL

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2), which permits appeals from final judgments of the highest court of a state "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . and the decision is in favor of its validity." While it has been argued that "[i]f there is any area of the law which should be crystal-clear, it is the jurisdiction of the Supreme Court of the United States," Wolfson and Kurland, *Certificates By State Courts of the Existence of a Federal Question*, 63 Harv. L. Rev. 111 (1949), this clarity, unfortunately, has not always been attained.

A. *Appeal or Certiorari*

The critical question here is whether Allenberg drew in question the constitutionality of the Mississippi statute as applied so as to justify the exercise of appellate jurisdiction by this Court. As an initial matter, there is an issue whether the "validity" of a state statute is sustained within the meaning of §1257(2). When the state court holds the statute applicable to a particular set of facts as against a contention that such an application is invalid on federal grounds. Citing *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1971), Stern and Gressman argue that such a state court decision—the kind under review here—does fall within the jurisdictional statute:

> This is true even though the statute on its face bears no federal impediment. Thus where the court holds that

a particular transaction is intrastate rather than interstate commerce and that on such basis the state statute may be applied and enforced, the validity of the statute has been sustained as to those facts.

R. Stern and E. Gressman, Supreme Court Practice (4th Ed.) 85 (1969) (hereinafter cited as *Stern and Gressman*).

Of course, *Dahnke-Walker* is a case heavily relied upon by Appellant with respect to the merits of this Cause; its jurisdictional significance is especially important also because, upon reargument, the Court found an appeal the appropriate method of review.

It is possible, however, that this Court could construe Appellant's claim in such a way that certiorari rather than appeal would lie. Appellant's Jurisdictional Statement (p. 2) requests that the papers be treated as a petition for certiorari as is authorized by 28 U.S.C. §2103, if certiorari would be the appropriate mode of review under §1257(3). Were appellant's claim viewed not as a challenge to the validity of the Mississippi statute as applied to the specific facts herein but rather taken as a claim of exemption from application of that statute because of the federal rights under the Commerce Clause, then certiorari would be appropriate. *Stern and Gressman* 85-87. Analyzed this way, the Mississippi Supreme Court's decision amounts to a denial of Allenberg's assertion of a federal Commerce Clause right, not a validation of the Mississippi statute. In such a situation, certiorari would be the appropriate method of review. Admittedly, the lines of demarcation here are somewhat difficult to follow; moreover, the distinctions should not ultimately affect this Court's determination to hear this cause. For the reasons amply demonstrated in Appellant's Jurisdictional Statement, this case in any event is "certworthy" and, even if review be discretionary, such discretion should be exercised to grant review on the

merits. This procedure has been adopted where the Court has postponed the question of jurisdiction to a hearing on the merits. *Stern and Gressman* 90. See *Garrity v. New Jersey*, 385 U.S. 493, 496 (1967).

B. *The Effect of the Mississippi Supreme Court's Certification*

"The mechanism of law—what courts are to deal with which causes and subject to what conditions—cannot be dissociated from the ends law subserves. So-called jurisdictional questions treated in isolation from the purposes of the legal system to which they relate become barren pedantry. After all, procedure is instrumental; it is the means of effectuating policy. Particularly true is this of the federal courts."

F. Frankfurter and J. Landis, The Business of the Supreme Court 2 (1928). The law of federal jurisdiction concerns the distribution of power between the states and the federal government. Unless viewed from this perspective, this field is "surely a sterile topic." *Hart and Wechsler's, The Federal Courts and the Federal System* (Bator, Mishkin, Shapiro, Wechsler ed.) (1973). Unfortunately, the law regarding the form and effect of state court certificates is somewhat opaque and smacks of the "barren pedantry" criticized by Frankfurter and Landis.

From §1257(2) and §1257(3), it is clear that a precondition for the exercise of Supreme Court jurisdiction is that the federal issue be "drawn in question" in the state courts. This represents a jurisdictional rule of federal comity for the orderly procedures of state courts. In the exercise of its appellate jurisdiction, the United States Supreme Court should not review claims not presented to the lower court whose final judgment it reviews. Naturally, in some cases, like this one, there will be ambiguity about

whether the federal question entered into the decision of the state court. The Mississippi statute and the Mississippi Supreme Court decision both refer to "interstate commerce," but neither states definitively whether this concept is identical with the federal constitutional concept. Moreover, the Mississippi Supreme Court did not explicitly state whether it considered the force of the federal Commerce Clause in its decision.

Cognizant of this ambiguity, Allenberg's counsel sought to clarify the situation by asking the state court to certify whether or not it had considered and decided the federal question. This certification procedure arose as a practical response to cases where the specific grounds of decision by a state court were ambiguous. It reflected a rational, common sense compromise that would both preserve state hegemony over state issues, see *Murdock v. City of Memphis*, 87 U.S. 590 (1875), and allow federal review of federal questions when appropriately raised in state proceedings. If federal-state comity and power distribution were the primary concerns, then it was reasonable for the United States Supreme Court to defer to the judgment of the state court if the state court certified that the federal question had been considered or raised. This deference is consistent with the desire to avoid federal intrusion on state court prerogatives. When the state court says it considered or decided a federal issue, there can be no concern of federal overreaching.

This Court's approach to cases in which state courts actually decide a federal question conforms to the general policies just described. This Court routinely refuses to examine whether a federal question was properly raised in state court proceedings when the highest state court assumes or holds that a federal question was properly before it. "There can be no question as to the proper

presentation of a federal claim when the highest state court passes on it." *Raley v. Ohio*, 360 U.S. 423, 436 (1959). This Court then considers it irrelevant to the exercise of its jurisdiction how or when the federal issue was raised in the state courts. "An irrebuttable presumption is created that the federal question was timely and properly raised." *Stern and Gressman* 127.

This Court's refusal to challenge a state supreme court's judgment about its own processes reflects the same sense of comity that underlies federal refusal to decide state law issues. It is not the business of the United States Supreme Court to challenge the propriety of a state supreme court's decision to consider or decide a federal question. Indeed, a contrary rule could promote federal-state disharmony.

The rule of deference that has grown up with regard to state court decisions considering or deciding federal questions has direct applicability to state court certifications. There is no reason for this Court to scrutinize such a certificate in any greater detail than it does a state court opinion. As two commentators have stated, the rule should be "that a certificate of a state court is conclusive as to whether a federal question has been raised and decided," Wolfson and Kurland, *Certificates By State Courts of the Existence of a Federal Question*, 63 Harv. L. Rev. 111, 117 (1949). Regardless of the means through which a state court speaks on this issue, its certification that it considered or decided a federal question should be conclusive.

This approach now has been adopted as a rule by this Court. For example, in *Lynumn v. Illinois*, 372 U.S. 528, 536 (1963), the Court declined to search beyond an Illinois Supreme Court certification that the decision of the federal claim was necessary to its judgment even though

a prior rule of Illinois procedure required that the constitutional claim be raised at trial. *Lynumn* is therefore a complete rebuttal to the point raised in Appellee's motion to dismiss or affirm that Allenberg failed to raise a constitutional claim at trial, a matter discussed in further detail below. See Motion to Dismiss or Affirm, p. 6, n. 4. See also *Ungar v. Sarafite*, 376 U.S. 575, 582-83 (1964) (New York Court of Appeals' amended remittitur held determinative); *Herb v. Pitcairn*, 324 U.S. 117, 128 (1945).

If the effect of a state court certification should be and is determinative when it states that a federal question was timely raised or decided, the next question is what form that certificate must take. The early case of *Martin v. Trout*, 199 U.S. 212 (1905), one of the first cases in which the state court certificate technique was used, distinguished between a certificate from the court and one from a single justice. 199 U.S. at 222-24. Some language in *Consolidated Turnpike Co. v. Norfolk and Ocean View Ry. Co.*, 228 U.S. 596 (1913), indicated that formal entry in a journal would be a distinguishing characteristic, but the Court in that case went on to assume that the certificate was from the state court and dismissed because of an adequate, independent state ground. The reason to distinguish between a court certificate and that of a justice is rational enough: any single judge may not share the same understanding of a case as do his brethren. But determining whether a certificate reflects a statement of a court and therefore its judgment on a case must be done with full understanding of the reasons for concern. There should be flexibility and deference to state court procedures, and counsel should be able to rely on the certificate he solicits from the state court.

In this case, counsel for Allenberg applied to Justice Powell for an extension of time so that he could "secure a

certificate from the Supreme Court of Mississippi" that the federal question had been timely raised. Counsel's application to Justice Powell cited *Lynumn v. Illinois*, 368 U.S. 908 (1961), in which the certification procedure was used. Moreover, the certificate of the Mississippi Court very closely parallels the language of the certificate held sufficient in *Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Co. v. Bay*, 200 U.S. 179, 182 (1906), to establish that the federal question was timely raised and necessarily considered. This is hardly an accident since the standard Supreme Court practice book, *Stern and Gressman*, sets this certificate out as a model in its forms section (p. 676). See also language from *Lanza v. New York*, 370 U.S. 139, 142 n. 6 (1962), cited in *Stern and Gressman* 677.

Allenberg presented its application to the Mississippi Supreme Court. The certificate was expressly made a part of the judgment and entry of reversal. It recites that the court considered and decided the federal question on appeal and in the petition for rehearing. Moreover, the state Supreme Court clerk certified that the Certificate was an order that appeared of record on file in her office. Under these circumstances it would be exalting form over substance to hold the certificate inadequate. Counsel for Allenberg conscientiously followed the path set out by this Court, and the certificate he received from the Mississippi court should be taken as what he sought, without having to go back to that court and have the certificate appear in some slightly different form with some extra magic words. This Court should respect the process of the state court—that it acted according to regular procedure. This Court runs no risk of overreaching federal jurisdiction when it pays heed to such explicit state court certification. If there is a problem, it is that of the Mississippi court to resolve for itself. Allenberg should be able to rely on its good faith effort to present the application to the state court

and to rely on the form as approved by this court and set out in the form book as a model. This certificate, therefore, should be sufficient to establish this Court's jurisdiction.

C. ***The Mississippi Statute is a Hybrid of State and Federal Law, and Jurisdiction Exists to Decide the Federal Questions.***

Even if the certificate of the Mississippi Supreme Court not be deemed conclusive on the question of whether the federal issue were adequately presented or decided by the state courts, it is clear that this court will accord such a certificate significant weight. This is especially true in a situation such as that herein where there is a close relationship between the state statute and federal rights under the Commerce Clause.

Under Mississippi law "No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state." Miss. Code 1942 Ann. §5309-239 (1972 Supp.). In the section defining the term "transacting business" the statute states that "a foreign corporation shall not be considered to be transacting business in this state, for the purposes of this chapter, by reason of carrying on in this state any one or more of the following activities: . . . (e) Transacting any business in interstate commerce." Miss. Code 1942 Ann. 5309-221 (1972 Supp.). Consequently, as a matter of state law, if a foreign corporation is transacting any business in interstate commerce, as defined by the Mississippi courts, then it need not have a certificate of authority in order to maintain an action in state courts.

This statutory framework is not totally novel with the state of Mississippi; it is derived in modified form from

the Model Business Corporation Act. ***Ross Construction Co. v. U.M.& M. Credit Corp.***, 214 So.2d 822, 826-27 (Miss. 1968); ***Parker v. Lin-Co. Producing Co.***, 197 So.2d 228, 230 (Miss. 1967). The exception to the qualification requirement for a foreign corporation when transacting interstate commerce is a legislative response to a constitutional mandate. That is, the interstate commerce exemption embodied in §5309-221(e) is not a purely voluntary exercise of legislative grace by the Mississippi legislature but a constraint imposed on state power by the Commerce Clause of the United States Constitution. Art. I, sec. 8. The right to conduct interstate commerce is guaranteed by the federal constitution, and no state can require a license for carrying out interstate business, absent a Congressional mandate. See, e.g., ***Crutcher v. Kentucky***, 141 U.S. 47, 57-58 (1891); ***International Textbook Co. v. Pigg***, 217 U.S. 91, 108, 111 (1910); ***Dahnke-Walker Milling Co. v. Bondurant***, 257 U.S. 282, 291 (1921); ***Furst v. Brewster***, 282 U.S. 493, 498 (1931); ***Eli Lilly & Co. v. Sav-On-Drugs, Inc.***, 366 U.S. 276, 278 & n. 7, 284-85 (1961). The commentary to the Model Business Corporation Act makes clear the constraint imposed on state power by the federal Commerce Clause. Indeed, it specifically cites and discusses ***International Textbook Co. v. Pigg***, 217 U.S. 91 (1910) and ***Dahnke-Walker Milling Co. v. Bondurant***, 257 U.S. 282 (1921) as reasons for exempting transactions in interstate commerce.

From this analysis, it would appear that the term "interstate commerce" in the Mississippi law is intended to conform to the federal constitutional concept. Indeed, sitting as a state court in a diversity case that arose after the Mississippi Supreme Court decision in this case, the federal court in northern Mississippi has held that the state law here in question incorporates the federal constitutional concept.

> "In summary, sitting in diversity as a Mississippi Court we have determined that the state intended to and did incorporate a federal standard into state law."

Cone Mills Corp. v. Hurdle, 369 F. Supp. 426, 433 (N.D. Miss. 1974). This view is bolstered by examination of section 5309-312, which indicates the state's intention to adopt the federal standard as its own referent. That section states that "The provisions of this chapter shall apply to commerce with foreign nations and among the several states only in so far as the same may be permitted under the provisions of the Constitution of the United States." This language indicates that Mississippi, when enacting its own law, intended to apply established federal concepts, as used in the Model Act and in *International Textbook* and *Dahnke-Walker*. This is also the express holding of *Cone Mills Corp.*, *supra*. *Cf.* 17 W. Fletcher, *Cyclopedia Corporations* 321 (1960) ("The question of what is interstate commerce is a federal question, and the federal decisions are controlling in state courts.")

Where state law incorporates or makes reference to federal constitutional principles, adequate grounds for exercising this Court's jurisdiction exist. In *State Tax Commission v. Van Cott*, 306 U.S. 511 (1939), a Utah tax statute exempted salaries for services rendered in connection with an essential governmental function. The Utah Court felt constrained by a United States Supreme Court ruling that federal salaries were immune from state taxation and held that the Utah statute did not apply. Subsequent to the Utah court's decision, this Court overruled the immunity case on which the Utah court had relied. This Court then took jurisdiction, finding that the federal question was so intermingled with the interpretation of state law that the adjudication of the state issue could not be made independently of the federal issue.

> "[I]f the state court did in fact intend alternatively to base its decision upon the state statute and upon an immunity it thought granted by the Constitution as interpreted by this Court, these two grounds are so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of the state law." *Id.* at 514.

Similarly, in this case the federal constitutional principles are so clearly a concern of the Mississippi legislature that interpretation of the Mississippi law must be closely interwoven with the Mississippi Supreme Court's view of the limitations imposed by the Commerce Clause.

In *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942), a unanimous decision of this court, the question was whether a military post exchange came within an exception in the California gasoline tax law for any motor vehicle fuel sold to the United States Government or any department thereof. This Court found that the California statutes incorporated federal law to determine the relationship between post exchanges and the government of the United States; it then proceeded to decide that under federal law post exchanges were arms of the federal government deemed by it essential for the performance of governmental functions. Accordingly, this Court took jurisdiction, decided the federal question, and reversed and remanded to the California courts.

In the present case, finding jurisdiction on the ground of state incorporation of federal law would permit a remand to the Mississippi Supreme Court to determine whether its view of state law would be altered after exposition of the federal law by this Court. This approach was followed not only in *Standard Oil v. Johnson*, *supra*, but also in *Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1 (1950), an FELA case. The Missouri Court denied de-

fendant's claim of *forum non conveniens* on ambiguous grounds. Writing for the majority, Justice Frankfurter noted three possible reasons for the denial of the *forum non conviens* claim: local procedure and the exercise of discretion, which would not involve a federal question; an interpretation of the Privileges and Immunities clause of the federal Constitution; an interpretation of the FELA statute. Despite this ambiguity, the Court took jurisdiction to decide that neither the federal statute nor the federal Constitution required a particular outcome:

> "Therefore, if the Supreme Court of Missouri held as it did because it felt under compulsion of federal law . . . , it should be relieved of that compulsion. It should be freed to decide . . . according to its own local law." 340 U.S. at 5.

The same approach was followed in *Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437 (1952). *Cf. Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69 (1946); *United Air Lines v. Mahin*, 410 U.S. 623, 630-32 (1973). The best statement of the rule adopted in *Van Cott, Johnson* and later cases was expressed by Justice Frankfurter:[1]

> ". . . where a decision under state law necessarily involves the construction or validity of federal law the determination of such federal law in the application of state law gives rise to a federal question for review here."

Flournoy v. Wiener, 321 U.S. 253, 272 (1944) (Frankfurter, J. dissenting).

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[1] In United Air Lines v. Mahin, 410 U.S. 623 (1973), Appellant argued in state court that a state law should be intepreted in a certain way. The Illinois Supreme Court rejected this argument, with two justices feeling unable to accept Appellant's position because of limitations imposed by the

(continued on following page)

Commentators have generally acknowledged that this Court's jurisdiction properly lies where state law incorporates or makes reference to federal law. The editors of an authoritative work on this Court's jurisdiction state the principle as follows:

> "Where the meaning of a state statute depends upon federal law, incorporated by it, a construction of that state statute interpreting federal law, presents a federal question for the Supreme Court and is not a state ground of decision. If this were not the rule, many intepretations of federal law by state courts would not be reviewable by the Supreme Court, and state legislatures could frame statutes in such a way as to preclude review of the constitutionality of their application by the Supreme Court."

Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (Wolfson and Kurland ed.) 180-181 (1951). And *Standard Oil Co. v. Johnson*, *supra*, is used as a principal case in the recently revised edition of a highly respected casebook on federal courts, indicating its continued vitality. Hart and Wechsler's *The Federal Courts and the Federal System* (Bator, Mishkin, Shapiro and Wechsler ed.) 483-89 (1973).

Perhaps the most detailed scholarly treatment of this issue is found in Greene, *Hybrid State Law in the Federal Courts*. 83 Harv. L. Rev. 289, 309-15 (1969). To deter-

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(Continued from preceding page.)
Commerce Clause. The Supreme Court agreed to decide the federal question because its disposition might have a determinative impact on the construction of state law. "The possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question." 410 U.S. at 630-31.

mine whether a state law is a "hybrid," with interconnecting state and federal elements, Greene argues that the "touchstone ... is whether the federal law is itself operative in the circumstances of the case—whether Supreme Court jurisdiction could effect the coordination of two coextensive and possibly conflicting obligations." *Id.* at 309. Greene uses an example of a state enactment that seeks to exercise the maximum state power without contravening a federal limitation on state authority. In such a case, a state might adopt the federal limitation as the definition of the power it seeks to exercise. Mississippi seems to have had the federal limitation in mind. *See* section 5309-312. If the state court seemingly decides a state question but inevitably relies on federal precepts, then it is proper to invoke Supreme Court jurisdiction. Green's discussion and cases cited hereinabove would justify this Court's exercising jurisdiction had the state court construed the state statute as Appellant Allenberg sought because of the federal overtones of such statutory construction. It surely must equally be the case that jurisdiction exists where the state court reads a state statute in such a way not to uphold a federal interest but to give too little weight to that federal constitutional interest. "If the state law is a hybrid, it ought to be reviewable in its own right, whether or not a federal question has been separately decided." *Id.* at 312. The hybrid state law issue, therefore, is not an adequate, independent ground barring review of the federal questions in the case; rather it is itself enough of a federal question to be indepently reviewable. *Id.* at 320.

Finding jurisdiction on the basis of the incorporation of federal standards in state law raises the further question for this Court of what issue to decide on the merits. In *Standard Oil Co. v. Johnson*, *supra*, Justice Black acknowledged that if the California court's construction of the state

statute had depended purely on local law, then that construction would have been conclusive; this Court would then have had to determine whether the California statute, as construed and applied, would violate the federal constitution. The approach in *Johnson* obviated the necessity of determining that ultimate issue since the Court construed federal law and remanded to the California court. The ultimate question was deferred until a later stage.

In the present case, a ruling that the Mississippi law was a hybrid, incorporating federal standards, would allow disposition on either a narrow ground as in *Johnson* or on the broader ground. Following *Johnson*, the Court could limit its analysis to whether the transaction was in interstate commerce as that concept has evolved in federal constitutional adjudication. See, *e.g.*, *Dahnke-Walker Milling Co. v. Bondurant*; *Lemke v. Farmers' Grain Co.*, 258 U.S. 50 (1922); *Eureka Pipe Line v. Hallanan*, 257 U.S. 277 (1921). Assuming that this Court would find that interstate commerce in the federal Constitutional sense was involved, as the Court in *Cone Mills* did, it would then be up to the Mississippi Court to determine whether the state statute therefore provided an exemption. See *Cone Mills*. If the state court on remand found the state statute applicable to the present factual situation, denying exemption to Allenberg, this Court on appeal would have to decide the issue whether this type of regulation of interstate commerce was constitutional. Alternatively, this Court could decide the broader issue now—determining on this appeal whether this application of Mississippi law not only involves interstate commerce but constitutes an undue or direct burden on such commerce, making it unconstitutional in its application. Either path is possible, but finding jurisdiction on the hybrid state law basis does allow a decision on the merits on a narrower federal ground. See *generally* Greene, *Hybrid State Law in the Federal Courts*, 83 Harv. L. Rev. 289, 312 n.92 (1969).

D. ***The Federal Question Was Timely Raised By Appellant in the State Court Proceedings.***

In the previous two sections, ***amicus*** has argued (1) that the Mississippi Supreme Court, through its certificate, has said that it actually considered and decided the federal question and (2) that the Mississippi law is a hybrid, inseparably intermixing federal and state concepts, and therefore a decision interpreting the application of state law herein necessarily involves a federal question. In this section, ***amicus*** will show as an independent matter that this Court should hold that Appellant Allenberg explicitly presented the federal question in a timely fashion under the circumstances.

Appellee Pittman concedes that Appellant Allenberg specifically and expressly raised the claim pressed here in a petition for rehearing before the Mississippi Supreme Court. Motion to Dismiss or Affirm at 10. Assuming for argument's sake that Appellee is correct in his assertion that the federal question was raised for the first time in the petition for rehearing—a matter disputed by Appellant, by the Mississippi Supreme Court's certificate, and by ***amicus***' hybrid law argument—there is still an issue whether raising the federal question at that stage was timely and therefore can support this Court's jurisdiction.

It is true, as Appellee contends, that raising the federal question in a petition for rehearing is generally insufficient to establish federal appellate jurisdiction. ***See Stern and Gressman*** at 124; Robertson and Kirkham, ***Jurisdiction of the Supreme Court of United States*** (Wolfson and Kurland ed.) 129 (1951). Nevertheless, it is also true, as Justice Harlan has noted, that the "issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question . . ." ***Street v. New York***, 394 U.S. 576, 583 (1969). A particular

situation cannot deprive a litigant of a reasonable opportunity to have his federal claim argued and decided. In such circumstances, the general rule about the ineffectiveness of a petition for rehearing must yield and raising the federal question will be timely in the petition for rehearing if that is realistically the earliest opportunity. ***See*** Robertson and Kirkham, ***supra***, at 130.

The early case of ***Saunders v. Shaw***, 244 U.S. 317 (1917), illustrates the kind of situation, similar to the present one, where an issue raised in the petition for rehearing was held sufficient to invoke this Court's jurisdiction. Plaintiff sued to enjoin collection of a drainage tax, offering evidence to show his land was outside the levee system and therefore not benefited. Defendant objected, and the trial court excluded the evidence as inadmissible; but for purposes of appeal the proof was put into the record. Defendant declined to cross-examine, maintaining his view that the evidence was inadmissible. The trial court sustained defendant's evidentiary position and ruled for him on the merits, a decision affirmed by the state supreme court. On rehearing, the state supreme court reversed itself, holding for plaintiff and relying on the evidence that his land was not benefited by the levee system and therefore not subject to taxation under the intervening decision in ***Myles Salt Co. v. Board of Commissioners***, 239 U.S. 478 (1916). Defendant then sought rehearing on the ground that he had not had an opportunity to challenge plaintiff's evidence on the issue of benefit, but the court denied this rehearing under its traditional limitation to one rehearing.

On appeal to this Court, defendant claimed that his inability to present evidence was a denial of due process that resulted from the state supreme court's decision. For a unanimous Court, Justice Holmes found that juris-

diction had been established. When the trial court ruled plaintiff's proof inadmissible, defendant was under no duty to put in evidence he deemed irrelevant. The due process claim did not arise until the state supreme court's decision, but a denial of rights need not only be by legislation, it can also be in the form of a judicial decision. *Cf. Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 680 (1930) (a violation of due process "is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid . . . state statute.") Justice Holmes observed that defendant raised the constitutional issue at the earliest opportunity, and he did not see what more could have been done.

In the present case, Allenberg sued on its contract in state court. Certainly it could not be expected to raise a constitutional issue in its complaint. It is sheer speculation whether Allenberg could have raised the federal constitutional question on appeal if it had lost in chancery court, for Allenberg's position was sustained at trial. Appellee concedes that "[u]nder Mississippi practice, Allenberg (having won below) was not required to make a . . . delineation of issues raised by the case." Motion to Dismiss or Affirm, at 6. Therefore, only when the Mississippi Supreme Court reversed the trial did Allenberg have an opportunity expressly to point out the federal question involved.[2]

In *Missouri ex rel. Missouri Insurance Co. v. Gehner*, 281 U.S. 313 (1930), a state statute taxing insurance company property allowed deductions for a reserve and unpaid policy claims. The company, in addition, deducted the United States Government bonds it held. The state board of equalization held that the reserve and unpaid claims were subject to state tax, ruling these deductions in violation of the state constitution. The board, however, found that the United States Government bonds were not taxable. On appeal the Missouri Supreme Court held that all assets, including the bonds, were taxable. The company petitioned for rehearing, arguing that the Missouri statute as so construed violated Article I, section 8 of the United States Constitution, which gives Congress the power to borrow money on the credit of the United States. *Id.* at 318-19. A unanimous court (the dissent was on the merits) agreed that the case was properly before the Supreme Court. Acknowledging that it generally will not consider contentions first made in the petition for rehearing, the Court said:

> But here the Company, at the first opportunity, invoked the protection of the federal constitution . . . It could not earlier have assailed the section as violative of the Constitution and laws of the United States. The board of equalization completely eliminated the bonds from its calculation . . . It may not reasonably be held that the Company was bound to anticipate such a construction ***or in advance to invoke federal protection against the taxation of its United States bonds***."

Id. at 320 (emphasis supplied).

Gehner and the case here under review are very similar from a jurisdictional perspective. Structurally, the power to borrow money comes immediately before the Commerce Clause in the Constitution, and the *Gehner* case involved a limitation on state power that flowed from the implications of the granted federal power. The present case

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[2] Of course, the Mississippi Supreme Court's Certificate and the hybrid nature of that state law both indicate that the federal question was in fact considered by the state court in the original appeal. This argument assumes, however, without conceding, that the petition for rehearing was the first time that the state courts were presented in the federal issue. This Allenberg did explicitly and in a timely manner at its first opportunity.

also involves a claim that a grant of federal power operates to curtail the exercise of certain otherwise valid state authority. In *Gehner* the state board upheld the Company's view that the United States bonds were not taxable. Here, the Chancery Court sustained Allenberg's view that it could maintain this action since the transaction was in interstate commerce and exempt from the qualification requirement. In *Gehner*, the state supreme court reversed, finding against the Company, and the Company immediately raised the federal claim in light of that construction. Here, the Mississippi Supreme Court likewise reversed, and Allenberg likewise pressed its federal claim in view of the court's interpretation of state law. In *Gehner*, the Court found that the company could not reasonably be held to anticipate the state supreme court's ruling. Here Allenberg could hardly be expected to anticipate a decision that directly contravened *Dahnke-Walker Milling Co. v. Bondurant*, *supra*, and a host of other precedents. The reasonableness of Allenberg's position is sustained by the similar view expressed by Judge Smith in *Cone Mills Corp. v. Hurdle*, 369 F. Supp. 426 (N.D. Miss. 1974) (Allenberg was also a party in a companion lawsuit). As in *Gehner*, the Court here should hold that it has jurisdiction.

Appellant's position is further supported by another unanimous decision, authored by Justice Cardozo, *Great Northern Ry. Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358 (1932). That case involved a claim by a shipper that freight rates, approved by a state commission, were excessive. The commission agreed and ordered a retroactive rebate, a procedure permitted under state statute according to prior case law. On appeal by the railroad, the state supreme court overruled its previous decision and held such retroactive rebates impermissible. However, the court sustained the shipper's claim by holding

the overruling prospective only and allowing all claims based on the previous decision. The railroad claimed this resolution violated due process.

This Court, after reciting the general rule, found that raising this claim in the petition for rehearing was sufficient to establish jurisdiction because the railroad could not object to the *prospective* application until the Court made its ruling. *Id.* at 367. Similarly, Appellant herein could not challenge the *effect* of the Mississippi Supreme Court's statutory interpretation until that court actually rendered its decision. But the point was brought to the court's attention in a timely manner at the first opportunity.

It is thus clear that the action of a state supreme court can itself raise federal constitutional questions. *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 680 (1930); *Cole v. Arkansas*, 333 U.S. 196, 201 (1948) (proceedings in state supreme court part of the process of law under which a conviction must stand or fall). And challenge of that action on a petition for rehearing will be deemed timely in such cases. Indeed, under the doctrine of *Corn Products Refining Co. v. Eddy*, 249 U.S. 429, 432 (1919), it may be that the *effect* of state court's action may be sufficient to raise the federal question. But the case for jurisdiction here is even stronger than in *Corn Products* because of the explicit attempt to obtain state court review of its own decision through a petition for rehearing. This presentation, even if in a petition for rehearing, serves the ends of federal-state comity and should be viewed with favor by this Court in cases of this kind. See generally *Beck v. Washington*, 369 U.S. 541, 553 (1962), distinguishing outcome therein from situation where review is sought in petition for rehearing.

II. APPLICATION OF THE MISSISSIPPI STATUTES TO THE PRESENT CIRCUMSTANCES, BARRING APPELLANT FROM EVER MAINTAINING AN ACTION TO ENFORCE A VALID CONTRACT, VIOLATES THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

Underlying the claim by defendant is a challenge to the very legal and constitutional system under which our national economy has grown and thrived. Defendant, who consciously stands in breach of concededly valid contracts, enlists the aid of this Court in an ignoble scheme. There is not one word in the record to challenge the validity of the contract entered into by Allenberg and Ben E. Pittman. Indeed, the testimony of Pittman is explicit acknowledgment of his signing a contract to deliver his cotton to Allenberg (A-82-85), and the trial court so held. Mississippi law expressly states that failure of a foreign corporation to obtain a certificate of authority "shall not impair the validity of any contract." Miss. Code 1942 Ann. § 5309-239 (1972 Supp.).

Rather, defendant-appellee, who intentionally seeks to trammel on the trust and fair-dealing (A-64) of Appellant, unabashedly requests this Court to ignore a four-square binding precedent, as the Mississippi Supreme Court did below. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921). Defendant, who appears in this Court with the unclean hands of a contract breacher, has the effrontery straight-facedly to urge this Court to uphold his claim because of the State of Mississippi's alleged interest in protecting against fraud. This is nothing but bald dissimulation. Unheeding of his own long-run interests, insensitive to the dire hardships imposed on others, unconcerned about the impact on federal policy, and uninhibited by considerations of fidelity to an integrated national marketplace,

defendant asks this Court to overrule, or re-interpret, explicit precedent in order to support his position.

The *Dahnke-Walker* doctrine, however, is as valid today as it was in 1921. As a matter of law, it stands on a solid foundation, and as a matter of policy this is an inappropriate case in which to erode its holding. *Dahnke-Walker* held that a state cannot require a foreign corporation to qualify to do business when transacting interstate commerce, and "[t]he purchase of goods by a foreign corporation for shipment to another state constitutes interstate commerce, and the commerce includes the purchase quite as much as it does the transportation." 17 W. Fletcher, *Cyclopedia Corporations* 373-74 (1960) (footnotes omitted). *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 290 (1921). The principle established protects interstate commerce from parochial state regulations that could fragment the national marketplace; it guarantees that no state can "impede an out-of-state seller's access to the state market . . ." *Eli Lilly and Co. v. Sav-on-Drugs*, 366 U.S. 276, 284 (1961) (Harlan, J., concurring). Under *Dahnke-Walker*, states are unable to require registration, certification or licensure as a precondition for transacting interstate commerce. That rule is as sound today as it was in 1921.

This doctrine has stood the test of time and spawned widespread development of commercial relationships in reliance on it. Only under the most compelling or equitable circumstances should it be eroded. *Cf. Flood v. Kuhn*, 407 U.S. 258 (1972); *State Bd. of Insurance v. Todd Shipyards*, 370 U.S. 451, 456-57 (1962); *Davis v. Dept. of Labor*, 317 U.S. 249, 258-59 (1942) (Frankfurter, J., concurring). Congress has adopted terminology similar to that in *Dahnke-Walker* with specific reference to cotton, 7 U.S.C. § 2101, § 1341. And indeed the regulatory scheme of the Model Business Corporation Act, from which the

Mississippi laws are adopted, ***Ross Construction Co. v. V.U.M. and M. Credit Corp.***, 214 So. 2d 822, 826-27 (1968), responds to the regulatory framework and limitations established in ***Dahnke-Walker***, exempting interstate transactions from state qualification requirements. See, Model Business Corporation Act Annot. 2d ed. § 106 (and comment 4.05); § 124 (1971). Actually, since the decision in ***Dahnke-Walker***, the severe penalty imposed for failure to qualify—inability to maintain an action in a state court—has become less important as this court has narrowed due process limitations on obtaining service of process and jurisdiction on foreign corporations. See ***International Shoe Co. v. State of Washington***, 326 U.S. 310 (1945) (enunciation of minimum contacts doctrine); Note, ***Foreign Corporations: The Interrelation of Jurisdiction and Qualification***, 33 Ind. L. J. 358, 376 (1958).

Also, the Mississippi penalty statute here under review, Miss. Code 1942 Ann. § 5309-239, is an especially draconian regulation since, unlike the Model Act, it does not incorporate a curative provision. Section 124 of the Model Act bars a foreign corporation from maintaining an action "until such corporation shall have obtained a certificate of authority." But Mississippi declined to include that saving feature in its adaptation of the Model Act. Under the Model Act, Allenberg could maintain this action because it obtained a certificate of authority to do business in Mississippi shortly after the Mississippi Supreme Court's ruling in this case. Motion to Dismiss or Affirm at B-12.

Under Mississippi law a foreign corporation is precluded from suing to enforce a contract right unless it had qualified to do business at the time of the transaction. ***Cone Mills Corp. v. Hurdle***, 369 F. Supp. 426, 432 (N.D. Miss. 1974); ***Parker v. Lin-Co Producing Co.***, 197 So.

2d 228, 230 (Miss. 1967). Thus, Allenberg's good faith effort at compliance is unavailing here. While this Court has upheld statutes denying access to state courts by foreign corporations in cases where intrastate activities were involved, ***Eli Lilly and Co. v. Sav-on-Drugs***, 366 U.S. 276 (1961), and where the company has localized its business operations so as to be indistinguishable from a domestic corporation, ***Union Brokerage Co. v. Jensen***, 322 U.S. 202 (1944), the consequences of those decisions were mitigated because both New Jersey, 366 U.S. at 277, and Minnesota, ***Union Brokerage Co. v. Jensen***, 9 N.W. 2d 721, 724 (Minn. 1943), had saving provisions, allowing suit upon subsequent qualification. Moreover, within the past five years or so, this Court has recognized the fundamental nature of a party's access to a judicial forum. See, ***e.g.***, ***Boddie v. Connecticut***, 401 U.S. 371 (1971). This recognition underscores the significant effect the penalty provision has and its interference with interests this Court has deemed of basic importance.

The Mississippi penalty is therefore unusually and unnecessarily severe and presents an especially poor case for retrenchment from the ***Dahnke-Walker*** standard. In Mississippi, retroactive modification of ***Dahnke-Walker*** would be extraordinarily disruptive, ***Cone Mills v. Hurdle***, 369 F. Supp. at 429 and reward breachers of valid contracts with windfall pecuniary gain at the expense of those who in good faith relied on settled judicial doctrine, which indirectly had the imprimatur of Congress in its cotton legislation and of the draftsmen of the Model Business Corporation Act. This result would be especially infelicitous since the state of Mississippi's interests are now adequately served by broad jurisdictional legislation, described ***infra***.

Moreover, withdrawal of a judicial remedy for a foreign corporation trying to enforce a contract made in interstate commerce may promote dubious extra-judicial acitivity. A non-qualified foreign corporation under Mississippi law can defend a lawsuit; it just cannot maintain one. As a result, were a prospective purchaser by self-help to gain possession of the goods contracted for it would have the legal authority to retain them under the terms of the contract in defending a suit. This means that in the present case, if Allenberg had resorted to self-help to gain possession of Pittman's cotton, perhaps removing the picked cotton from temporary storage ricks on the farm, Allenberg could have asserted its legal rights under the contract. This Court has indicated its unwillingness to promote extra-judicial self-help remedies in commercial transactions, but upholding the Mississippi court herein would bring about that result. *Cf. Mitchell v. W. T. Grant Co.*, 42 U.S.L.W. 4671, 4677 (U.S. May 13, 1974).

While this Court undoubtedly can and often has reviewed constitutional doctrine in light of experience or an altered historic environment, *Mitchell v. W. T. Grant Co.*, 42 U.S.L.W. 4671, 4682 (U.S. May 13, 1974) (Stewart, J., dissenting), it has been "loath" to overturn Commerce Clause cases which have set a pattern of commercial practice, explicitly or implicitly accepted by Congress and relied on by the commercial interests involved. See *Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972); *State Bd. of Insurance v. Todd Shipyards*, 370 U.S. 451, 457 (1962). This Court should be particularly wary of overturning a course of trade that has proven so successful, and is so vital to a smooth functioning market in cotton and other raw agricultural commodities. Chief Justice Burger, in deferring to a forum selection clause in an international contract, pointedly has observed that the expansion of American business "will hardly be encouraged" if "solemn

contracts" are not given effect by the courts. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). This deference to precedent is all the more warranted when the equities of the specific case are taken into account. This contract

> "was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts . . . There are compelling reasons why a freely negotiated private international [or interstate] agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect."

M/S Bremen v. Zapata Off-Shore Co., 407 U.S. at 12-13.

The claim by Appellee Pittman is hardly the compelling circumstance that would justify wholesale re-examination or erosion of the *Dahnke-Walker* rationale. On the contrary, developments subsequent to *Dahnke-Walker* reinforce the wisdom of its doctrine in facilitating commerce while encouraging states to promote their legitimate interests in less intrusive ways. Accordingly, because it is sound and because no adequate reasons for re-evaluation exist, this Court should be guided by its venerable precedent.[3]

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[3] Amicus recognizes that **Dahnke-Walker** was decided in an era when substantive due process was at its peak. This Court recently has rejected that approach particularly in areas of economics and welfare. See **North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.**, 42 U.S.L.W. 4035, 4038-39 (U.S. December 5, 1973); **Ferguson v. Skrupa**, 372 U.S. 726 (1963). But this disavowal of earlier substantive due process cases does not control Commerce Clause precedents. The Court has allowed greater leeway for state activity under the police power where the actions involve intrastate affairs than when the federal interest in interstate commerce is involved. See **Bibb v. Navajo Freight Lines, Inc.**, 359 U.S. 520, 529 (1959); **Compare Powell v. Pennsylvania**, 127 U.S. 678 (1888)

(Continued on following page)

A. *Mississippi's Regulation of Foreign Corporations*

Several observations about the Mississippi statutory framework are germane. First, as previously noted, the Mississippi corporate statutes are based generally on the Model Business Corporation Act. Section 5309-239, the penalty provision regarding transacting business without a certificate of authority, draws heavily from section 124 (formerly section 117) of the Model Business Corporation Act; but there is one major and extremely significant difference: the Model Act has an explicit curative provision so that a foreign corporation is barred from maintaining an action only until such time as it obtains a certificate of authority. The Mississippi statute disallows subsequent cure by qualifying to do business (see *Cone Mills Corp. v. Hurdle*, 369 F. Supp. at 431-32; *Parker v. Lin-Co Producing Co.*, 197 So.2d 228, 230 (Miss. 1967); obviously the chilling effect and possible disruption of such a provision on the free flow of interstate commerce is strikingly acute.

Second, the exception, when interstate commerce is being transacted, to the certificate of authority requirement is a legislative response to a constitutional mandate. That is, "it would be unrealistic to conclude the interstate commerce exception was enacted as a voluntary exercise of legislative grace. It is a recognition of a constraint imposed upon state power by the Commerce Clause."

(Continued from preceding page)

(Due Process Clause does not bar state from prohibiting production and sale of oleomargarine) with **Schollenberger v. Pennsylvania**, 171 U.S. 1, 15-17 (1898) (Commerce Clause bars state from prohibiting the flow of uncolored oleomargarine into the state from another state). This reflects both the different character of the federal interest in due process and commerce cases and the concomitantly different role necessarily played by the Court in these kinds of cases. See **Southern Pacific Co. v. Arizona**, 325 U.S. 761, 767 (1945).

Cone Mills Corp. v. Hurdle, 369 F. Supp. at 432. Section 5309-221(e) derives from and was enacted to satisfy a constitutional duty not to impose preconditions on a foreign corporation's access to local markets in transacting interstate commerce. This point is further elaborated, with citations, in the section on jurisdiction over hybrid state laws.

Third, the severe penalty section in the Model Business Corporation Act, and the even more stringent penalty provision in the Mississippi Act, barring access to state courts to non-qualified foreign corporations, are "designed to enable Mississippi citizens to seek necessary judicial redress locally by encouraging 'foreign' corporations transacting business in Mississippi to make themselves amenable to process in this state." *Cone Mills Corp. v. Hurdle*, 369 F. Supp. at 431. This rather severe penalty for not qualifying can only be understood in light of early doctrines governing personal jurisdiction over foreign corporations.

Traditionally, there have been two bases of personal jurisdiction over foreign corporations: actual consent, normally manifested by compliance with a state qualification statute; and engaging in sufficient activity within the state to establish a jurisdictional basis. Note, *Foreign Corporations: The Interrelation of Jurisdiction and Qualification*, 33 Ind. L.J. 358 (1958). It was quite understandable why states would impose heavy sanctions on foreign corporations which did not obtain a certificate of authority (and thereby qualify to do business); such qualification subjected foreign corporations to state jurisdiction through consent. A foreign corporation could choose not to qualify, but the severe penalty in case it guessed wrong —not being able to maintain an action in state courts— was an incentive to qualify and thereby subject itself comprehensively to state jurisdiction.

This rationale sheds light on the reason for these penalty provisions. They were not designed as vehicles for windfall gain for fortunate defendants, but rather as means for subjecting foreign corporations to suit and accountability in the courts of the state. Viewed in this light, the customary inclusion of a currative provision becomes understandable since the state's objective is corporate responsibility to the citizens of the state, not abrogation of legitimate obligations by state residents to foreign corporations.

This Court's decision in *Internationl Shoe Co. v. State of Washington*, 326 U.S. 310 (1945) discarded the "doing business—presence or implied consent" rationale for jurisdiction "and its mechanistic determinations in favor of a more flexible and realistic jurisdictional basis of reasonableness in view of the activity within the state." Note, *Foreign Corporations: The Interrelation of Jurisdiction and Qualification*, 33 Ind. L.J. 358, 373 (1958). Chief Justice Stone described "certain minimum contacts" within the state "such that the maintenance of suit does not offend 'traditional notions of fair play and substantial justice.'" 326 U.S. at 316. Relevant factors included the character of the corporation's activities and not just their quantity.

In the subsequent case of *Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437 (1952), this Court indicated an expansion in the constitutionally permissible extent of state jurisdiction over a non-qualified foreign corporation. *International Shoe* reduced the limitations on the *basis* of and *Perkins* reduced the limitations on the *extent* of jurisdiction over non-qualified foreign corporations, and these jurisdictional criteria are now embodied in the *Restatement 2d of Conflict of Laws*. See sections 42, 52, and 43-51. They are also reflected in the jurisdictional and service of process statutes of Mississippi.

Mississippi corporate law allows service of process on foreign corporations even if they have not qualified to do business in the state. Section 5309-230 provides for service of process on foreign corporations that are authorized to transact business, but the last sentence notes that "Nothing herein contained shall limit or affect the right to serve any process, notice or demand, required or permitted by law to be served upon a corporation in any other manner now or hereafter permitted by law." And § 5345 states that "Any corporation claiming existence under the laws of any other state ..., found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are...." Section 5346 then sets out the basis for service of process on foreign corporations which do not qualify to do business in Mississippi pursuant to 5309-221, -225, and -226. Section 5346 provides in pertinent part as follows:

> Process may be served upon any agent of such foreign corporation found within the county where the suit is brought, no matter what character of agent such person may be; and in the absence of an agent, it shall be sufficient to serve the process upon any person, if found within the county where the suit is brought, who represented the corporation at the time of the transaction out of which the suit arises took place, or if the agency through which the transaction was had be itself a corporation, then upon any agent of that corporation upon whom process might have been served if it were the defendant.

In the instant case plaintiff was represented in its dealings with all defendants herein by a Mr. Hayward Covington. Mr. Covington has a residence in Marks, Mississippi, and by the terms of § 5346 plaintiff Allenberg could have been served, in case of any breach on its part, through

service on Mr. Covington. Section 5346 is perfectly adequate to assure cotton growers their day in court in case of a prospective breach by a cotton purchaser. See also § 1437, Mississippi's long arm statute. The supposed protection against fraud embodied in § 5309-239, the bar to access to Mississippi courts, is quite clearly overkill in the context of the cotton producer/cotton purchaser relationship. Section 5346 offers a much less intrusive means of protecting Mississippi farmers against fraud by foreign corporate purchasers.

The diminished limitations on the exercise of state jurisdiction over foreign corporations have spawned vastly expanded jurisdictional statutes not only in Mississippi but elsewhere, as reflected by the 1971 edition, Restatement 2d of Conflicts. It is therefore fair to conclude that

> "insofar as qualification sought jurisdiction through actual consent and sought to induce compliance by a negative, self-enforcing, no-suit sanction, the present rules and the results thereunder are without reason. A non-complying foreign corporation is denied access to the courts through the application of a no-suit sanction on the ground that by its failure to qualify it has not made itself available to the local forum. But in truth, if the state or a private party plaintiff sought to bring an action against the corporation, jurisdiction could be had . . . The result is that defendants to actions brought by corporate plaintiffs are often relieved of their just obligations, a result that should be permitted only if necessary to serve a greater public interest. Such justification is lacking now and perhaps always has been."

Note, ***Foreign Corporations: The Interrelation of Jurisdiction and Qualification***, 33 Ind. L.J. 358, 376 (1958).

The existence of a satisfactory alternative to the penalty provision—an alternative which has a much less harmful effect on interstate commerce and does not chill such commerce—is relevant in determining the constitutional validity of the Mississippi statute in this case. See generally ***Pike v. Bruce Church***, 397 U.S. 137, 142 (1970) (The extent of the burden on interstate commerce that will be tolerated depends in part on whether the state's interests "could be promoted as well with a lesser impact on interstate activities."); ***Dean Milk Co. v. Madison***, 340 U.S. 349, 354 (1951) (Economic barriers to interstate commerce cannot be erected under the police power "if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available.")

The existence of alternate means of protecting against fraud, by serving process on a foreign corporation's agent, or through the long-arm statute, highlights exactly what is at stake in this litigation. Defendant seeks not to vindicate the interests of the state in guarding against fraud. That is a masquerade, a smokescreen, a sham. Defendant, rather, risks undermining the national system of commerce so necessary to the economic welfare of the nation, not for the noble purpose of defending the interests of Mississippians against overreaching foreign corporations but for self-aggrandizement, pure and simple. There is and can be no inference of wrongdoing on the part of plaintiff in this transaction; but if defendant should claim some grievance against plaintiff, he has his remedy in the courts of the state of Mississippi pursuant to § 5345 and § 5346 or § 1437. Clearly, it is not a fair day in court that defendant seeks but rather an absolute roadblock to an impartial hearing on the merits. Indeed, on that hearing on the merits, the trial court has already ruled against defendant. This is not protection against fraud; it is sheer venality.

B. *The Issues Under the Commerce Clause*

The Commerce Clause has long been viewed as a major source of federal power. Since the days of the New Deal, the courts have found increasingly broad Congressional authority to protect and promote an integrated national market. See, *e.g.*, *National Labor Relations Board v. Jones &Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). But as this Court noted in *Wickard*, it was Chief Justice John Marshall who described the federal commerce power with a "breadth never yet exceeded." 317 U.S. at 120. It was Marshall who held an organic concept of commerce, and that view has held pre-eminence for at least thirty-five years. *Cf. United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 547 (1944) (Insurance contracts, though local in nature, are part of a "chain of events which becomes interstate commerce.")

That the Commerce Clause grants extensive power to the federal government, however, has not precluded all state exercise of regulation that might have some bearing on commerce. Since the decision in *Wilson v. Black-Bird Creek Marsh Co.*, 27 U.S. 245 (1829), this Court has recognized that there is some room for legitimate state regulatory power, even where there is an incidental effect on interstate commerce. See *Cooley v. Board of Port Wardens*, 53 U.S. 299 (1851). Of course, where Congress chooses to exercise its authority, inconsistent state legislation affecting commerce must fall. See generally *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945). But even in the absence of Congressional action, state legislation will be held invalid under the negative implication of the Commerce Clause where there

is a need for national uniformity or where the burden on commerce is direct or substantial. See *Cooley*; *Southern Pacific*; *Pike v. Bruce Church*, 397 U.S. 137 (1970). As the Court stated in *Southern Pacific*, 325 U.S. at 769:

> For a hundred years it has been accepted constitutional doctrine that the Commerce Clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the Commerce Clause the final arbiter of the competing demands of state and national interests.

See *also Freeman v. Hewit*, 329 U.S. 249, 252 (1946).

In analyzing any particular state statute in light of the Commerce Clause, the Court will examine both the nature and the effect of the burden on commerce. *Southern Pacific*, 325 U.S. at 770; *Pike*, 397 U.S. at 145. It will determine whether Congress has spoken on the issue since "Congress has the undoubted power to redefine the distribution of power over interstate commerce." *Southern Pacific*, 325 U.S. at 769; *cf. Union Brokerage Co. v. Jensen*, 322 U.S. 202, 209 (1944). It will determine whether uniformity of regulation is necessary, for if it is then state power must yield. See *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959). It will examine the existence of alternatives available to the states that have a lesser impact on interstate commerce. See *Pike*, 397 U.S. at 14; *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951); *Parker v. Brown*, 317 U.S. 341, 367 (1943) (state's measure "appropriate to the end sought"); *Duckworth v. Arkansas*, 314 U.S. 390, 393, 396 (1941) (statute "reasonably necessary" to achieve state's goals). And finally, even if the effect of the state law on commerce is

only incidental, the Court will balance the local and national interests at stake and if compelling allow the state law to stand. *Pike* at 146.

1. *Analytical Framework*

It should be clear that a basic threshold question in the Commerce Clause analysis is the existence of interstate commerce in the federal constitutional sense. Under Commerce Clause doctrine, however, the existence of interstate commerce does not of itself end the analysis since some state laws can have an effect on commerce and still pass constitutional muster. See, *e.g.*, *Huron Cement Co. v. Detroit*, 362 U.S. 44 (1960). A second analytical step is therefore necessary before a statute can be declared either constitutional or unconstitutional under the Commerce Clause.

The Mississippi statute establishes an exemption for transactions in interstate commerce to the general qualification requirement for foreign corporations. Miss. Code 1942 Ann. §5309-221(e). In the section on jurisdiction, *amicus* has argued that the Mississippi law is a hybrid, incorporating the federal constitutional definition of interstate commerce into state law. This view was adopted by the federal district court in *Cone Mills Corp. v. Hurdle*, 369 F. Supp. 426, 432 (N.D. Miss. 1974). Under this approach, it would be appropriate for this Court to decide only the narrow question whether the transaction involved is in interstate commerce. A finding here that interstate commerce is involved would dictate a reversal, with the possibility of a remand to allow the Mississippi Court to re-construe the statute in light of this Court's guidance on the federal constitutional meaning of interstate commerce. *Cf. Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952); *United Air Lines v.*

Mahin, 410 U.S. 623, 630-31 (1973). In *Cone Mills Corp.*, Judge Smith concluded that the state law incorporated the federal concept of interstate commerce; he independently found that Allenberg (a plaintiff in a case consolidated with *Cone Mills Corp.*) conducted its cotton merchandising business in interstate commerce, and found as a matter of state law that Allenberg was therefore exempt from the qualification requirement under Mississippi law. This Court could likewise restrict its analysis at this time to the question whether this transaction was in interstate commerce, without reaching the ultimate question whether such interference transgressed the power of the state as limited by the Commerce Clause.

2. *Defining Interstate Commerce Under Article I, Section 8*

The threshold question in Commerce Clause cases is whether or not the subject of regulation involves or affects interstate or foreign commerce. This is true both when the issue is Congressional power and state police power. If a given activity is in intrastate commerce and has no effect on interstate commerce, then the federal government has no legislative authority pursuant to the Commerce Clause or the necessary and proper clause. For this reason, the courts since at least 1937, when the *Jones and Laughlin Steel* case was decided, 301 U.S. 1 (1937), have consistently construed the scope of interstate activity and concern broadly. In a country whose economic prosperity has depended on the preservation of a smooth national market, unencumbered by localized barriers to the flow of trade, it is axiomatic that the scope of federal power must be pervasive. Especially in a highly industrialized and interdependent economy, the need for defining federal

commerce interests broadly is critical.[4]

At least since the time of *Swift and Co. v. United States*, 196 U.S. 375 (1905), a federal antitrust action against a meatpackers' conspiracy, the Supreme Court has recognized that activities nominally conducted within a single state can have a significant impact on interstate commerce and are therefore subject to federal regulation. *Cf. Houston East and West Ry. v. United States*, 234 U.S. 342 (1914) (*Shreveport Rate Case*). And in *Chicago Board of Trade v. Olsen*, 262 U.S. 1, 40 (1923), in upholding the validity of the Grain Futures Act, the Supreme Court noted the importance of the question of price in trade among the states: "Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it." *Cf. Lemke v. Farmers' Grain Co.*, 258 U.S. 50 (1922).

Perhaps the most graphic illustration of the Court's concern with aggregate effects is the case of *Wickard v. Filburn*, 317 U.S. 111 (1942), which upheld the application of the Agricultural Adjustment Act of 1938 to home-grown and home-consumed wheat. Pursuant to the Act, federal authorities regulated production of wheat even if intended for consumption on the producer's farm. Subjected to a penalty for producing wheat in excess of the quota allotted to him, appellee claimed that his crop was not within the

[4] Perhaps no single piece of federal legislation so clearly indicates the modern economic interdependencies as the wage and price controls under which this country lived for the past two years. These national regulations cover in minute detail what at one time might have been considered purely local activities. The reason for such comprehensive regulations at the national level is that inflation nationwide can be affected by economic activity at all levels. Aggregate demand and aggregate supply have a determinative impact on the national marketplace, and therefore the individual elements of the national market, taken collectively, have a nationwide effect.

reach of federal power because it was consumed on his farm. The Court held that the home-consumed crop could be regulated by Congress, finding that a home-consumed product like wheat has an effect upon the price and market conditions for wheat. Even if never marketed, it supplies a need of the producer that would otherwise be met by purchases in the market. "Home-grown wheat in this sense competes with wheat in commerce." 317 U.S. at 128. To similar effect is *United States v. Wrightwood Dairy Company*, 315 U.S. 110 (1942), wherein this Court upheld a federal regulation of the price of milk produced and sold entirely within Illinois. *Cf. United States v. Rock Royal Co-op*, 307 U.S. 533, 568-569 (1939).

The importance of allowing broad Congressional authority over commerce cannot be stressed too greatly. Yet, if in a situation such as this case, where the question is the validity of a state law, the Court defines the scope of the Commerce Clause interests narrowly, then it must also at the same time necessarily circumscribe Congressional power. Since Congress can only regulate activities in or that affect interstate and foreign commerce, a finding that no interstate commerce is involved or affected implicitly means that Congressional regulatory power is somewhat diminished. But the broad federal regulatory activity with regard to farm products—legislation consistently upheld by the courts—indicates the paramount federal concern with raw agricultural production and marketing, an interest that is threatened by the lower court's action herein.

At this point it will be helpful to review some of the specific characteristics of the cotton industry. The cotton market is a "complex of interrelated, economic forces and institutional facilities which in operation serves to equate the demand for and the supply of cotton in terms

of prices." A. Cox, *Cotton: Demand, Supply, Merchandising* 1 (1953). The various local trading units and cotton exchanges are not self-contained markets but part of an overall cotton marketing system. *Id.* The relevant area for defining the cotton market is the territory over which the economic forces and institutional facilities operate to establish effective price competition. "The area of the market for cotton is world-wide, though the facilities for effecting the bulk of the transactions are located in a comparatively few well-known exchanges with world-wide memberships and wire connections." *Id.* at 1-2. Because the costs of communication and transportation are relatively low, there is international competition in the world marketplace and a "definite price relationship" among all units of the world market. Thus, it can be accurately concluded that there is a "world price and world market for all cotton as well as for each major growth (such as American)." *Id.* at 2.

In recognition of the organic nature of interstate commerce and of the need to define interstate commerce as a dynamic process, both Congress and the Supreme Court have given their approval to the "stream of commerce" concept. For example in the Packers and Stockyards Act, Congress defined interstate commerce as follows:

> ...[A] transaction in respect to any article shall be considered to be in commerce if such article is part of that current of commerce usual in the livestock and meatpacking industries, whereby livestock [et al] ... are sent from one State with the expectation that they will end their transit, after purchase, in another, including ... all cases where purchase or sale is either for shipment to another State, or for slaughter of livestock within the State and the shipment outside the State of the products resulting from such slaughter.

7 U.S.C. §183. In *Stafford v. Wallace*, 258 U.S. 495 (1922), the Supreme Court upheld the Act, relying upon the stream of commerce concept as developed in *Swift and Co. v. United States*, 196 U.S. 375 (1905). See *also Lemke v. Farmers' Grain Co.*, 258 U.S. 50 (1922); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921); *Eureka Pipe Line v. Hallanan*, 257 U.S. 277 (1921).

A similar broad view is reflected in the Congressional definition of interstate commerce in the Commodity Exchange Act 7 U.S.C. §3, which is an almost identical restatement of the definition contained in the Packers and Stockyard Act. But of most direct significance to the issues in the instant case is the very recent Congressional declaration of policy with specific reference to cotton, in the Cotton Research and Promotion Act, 7 U.S.C. §2101:

> Cotton is the basic natural fiber of the Nation. It is produced by many individual cottongrowers throughout the various cotton-producing States of the Nation. ***Cotton moves in large part in the channels of interstate and foreign commerce and such cotton which does not move in such channels directly burdens or affects interstate commerce in cotton and cotton products. All cotton produced in the United States is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects interstate or foreign commerce in cotton or cotton products.*** The efficient production of cotton and the maintenance and expansion of existing markets and the development of new or improved markets and uses is vital to the welfare of cottongrowers and those concerned with marketing, using, and processing cotton as well as the general economy of the Nation. (Emphasis supplied).

This explicit Congressional finding that all cotton produced in the United States is in interstate commerce or directly affects it is a reaffirmation of the realities of the cotton trade as described by Professor Cox in his previously quoted work.[5] As the Supreme Court has often stated, this Congressional statement is entitled to great judicial deference, see *e.g.*, *Southern Pacific Co. v. Arizona*, *supra*. In *Cone Mills Corp.*, *supra*, the Court specifically found that "[t]here is no significant amount of cotton milling in Mississippi .... As a practical matter in the cotton industry, Mississippi cotton almost invariably has an out-of-state destination." 369 F. Supp. at 436.

The principles of defining interstate commerce that have evolved in deciding the scope of federal power have likewise been applied by the courts in cases like the present one where the negative implications of the Commerce Clause are at issue. That the standards for determining whether interstate commerce is involved are interrelated regardless of whether the question arises in the context of a federal statute or a state law is made clear by cross-citations. For example, in *United States v. Rock Royal Co-op*, 307 U.S. 533 (1939), a challenge to the validity of a federal regulation of the price of milk sold within a state, the Court rejected the contention that Congress was powerless to regulate such a local transaction. Specifically citing *Dahmke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 290, 291 (1921) and *Lemke v. Farmers' Grain Co.*, 258 U.S. 50, 54 (1922), cases invalidating state laws as

[5] As a legislative finding, Congress has also determined that "American cotton is a basic source of clothing and industrial products used by every person in the United States and by a substantial number of people in foreign countries. American cotton is sold on a world-wide market and moves from the places of production almost entirely in interstate and foreign commerce to processing establishments located throughout the world ...." 7 U.S.C. §1341.

violations of the Commerce Clause, the Supreme Court in *Rock Royal* held that interstate commerce was involved since "where commodities are bought for use beyond state lines, the sale is part of interstate commerce." 307 U.S. at 568-69 & n. 38. When interstate commerce was found, federal power followed.

The Supreme Court's decision in *Dahmke-Walker* on the interstate commerce issue is directly on point here and should be controlling. In the present case Allenberg, a cotton merchant, contracted with the defendant through a local agent for the delivery of cotton at the time of harvest. Under the terms of the contract and pursuant to the normal course of dealing, the picked cotton would be ginned, separating the seed and the hull from the cotton, and pressed into bales. Under the terms of the contract, the cotton is then to be placed in a warehouse, which would issue a negotiable warehouse receipt. The seller then would deliver the warehouse receipt and the U.S.D.A. classification cards to the local broker, who would pay the farmer and draw a draft on a Memphis bank for reimbursement (A-53, 68). Samples of the bales of cotton were to be sent by the farmer both to the U.S. Department of Agriculture for classification and to Allenberg at its office in Memphis (A-7). Under the contract, if there is a delay in the process of issuing the negotiable receipt, then the responsibility for paying warehouse charges remains with the seller. This means that the risk of loss stays with the seller until the receipt is transferred to Allenberg, or until the cotton is invoiced to Allenberg (A-7, ¶4).

The cotton bought by Allenberg in Mississippi, including Pittman's cotton, was *all* purchased for shipment outside of Mississippi (A-78, 79, 96). The cotton purchased by Allenberg from Pittman had already been obligated by Allenberg to customers outside of Mississippi before this

contract had been entered into. The Pittman cotton, indeed, was purchased for the purpose of satisfying part of this obligation (A-79). The contract with Pittman was typical in this regard of Allenberg's normal course of dealing. All cotton purchased by Allenberg was shipped in interstate commerce and obligated prior to the transaction to customers outside of Mississippi. It thus had an ascertainable destination out of state at the time the contract was made; "according to the general practice of the industry, the commodity became a part of interstate commerce when it was purchased by Allenberg." *Cone Mills Corp.*, *supra*, 369 F. Supp. at 436-37.

In *Dahnke-Walker* a Tennessee corporation contracted with a Kentucky farmer for the purchase of wheat through a locally resident agent. Delivery of the wheat and payment were both to take place in Kentucky, and nothing was stated expressly in the contract about the ultimate destination of the wheat although *Dahnke-Walker* intended to use it in its mill located in Tennessee. Since the Tennessee corporation had made other purchases of wheat in Kentucky, the transaction was not a single isolated deal but part of a course of trade.

As in the instant case, the farmer in *Dahnke-Walker* claimed that the transaction was not in interstate commerce. The Kentucky court sustained that view, finding that the activity was intrastate commerce; it therefore held the contract unenforceable by the Tennessee corporation, which had not qualified to do business in Kentucky. On appeal the United States Supreme Court reversed, holding that the transaction was in interstate commerce. It is noteworthy that this Court heard reargument in the *Dahnke-Walker* case, and decided a similar issue on that same day in *Eureka Pipe Line Co. v. Hallanan*, 257 U.S. 265 (1921),

so it is clear that the Court gave special attention to the important issue confronting it.

The facts and holding in *Dahnke-Walker* are on all fours with the instant case. The Supreme Court expressly stated that interstate commerce is "not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse." 257 U.S. at 290. That organic view of interstate commerce as a dynamic process has been the predominant understanding of the concept and has been followed undeviatingly since 1937. See *Bruhn's Freezer Meats v. United States Department of Agriculture*, 438 F.2d 1332, 1339-40 (8th Cir. 1971). The Court in *Dahnke-Walker* went on to hold, 257 U.S. at 290-91:

> Where goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. [citations omitted] On the same principle, ***where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation*** . . .
>
> . . . In no case has the court made any distinction between buying and selling or between buying for transportation to another state and transporting for sale in another state. Quite to the contrary, the import of the decisions has been that, if the transportation was incidental to buying or selling, it was not material whether it came first or last. (Emphasis supplied.)

The *Dahnke-Walker* standard for determining interstate commerce was followed in *Lemke v. Farmers' Grain Co.*, 258 U.S. 50 (1922), where the Court invalidated a compre-

hensive North Dakota regulatory scheme for the purchase of locally produced grain. Purchasers of grain in North Dakota bought with the intent of shipping for resale in Minnesota. The Court found that this out-of-state shipment was the general course of business in the grain trade, 258 U.S. at 42, much as shipment of cotton out of Mississippi is the usual course of business in the cotton trade. Citing *Dahnke-Walker*, the Court in *Lemke* said: "That such course of dealing constitutes interstate commerce, there can be no question." *Id.* The Court reached this conclusion even though it conceded that the grain could have been diverted to a local market; it was enough for the Court that such was not the ordinary course of business. *Id.* at 55. *Cf. Eureka Pipe Line Co. v. Hallanan*, 257 U.S. 265, 272 (1921).

In *Shafer v. Farmers' Grain Co.*, 268 U.S. 189 (1925), the Court invalidated a new North Dakota law regulating grain transactions. The Court noted that the buyers made and executed contracts within the state, but that the wheat was purchased for shipment out of state as soon as grain accumulated in carload lots. Finding that wheat was an article of commerce and the "subject of dealings that are nation-wide," the Court concluded that "[b]uying for shipment, and shipping, to markets in other States when conducted as before shown constitutes interstate commerce—*the buying being as much a part of it as the shipping*." (Emphasis supplied) 268 U.S. at 198. Similarly, purchasers of cotton in Mississippi, in the ordinary course of their business, intend to ship outside the state, and in this case Allenberg expected to ship out of state as soon after acquiring the legal ability to do so as possible.

In *Furst v. Brewster*, 282 U.S. 493 (1931), the Court gave further meaning to its interpretation of interstate commerce. Invalidating a statute which operated much

like the Mississippi statute in the present case, the Supreme Court held that every negotiation, contract, trade, and dealing between citizens of different states, which contemplates and causes the importation from one state to another, whether of goods, persons, or information, is a transaction in interstate commerce. *Id.* at 497-98. It is clear that Allenberg contemplated the shipment of the cotton it bought from Mississippi to its out-of-state customers at the time of purchase and customarily effectuated that interstate movement at the earliest possible time.

Subsequent decisions by this Court have reaffirmed the breadth of the interstate commerce concept. For example, in *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944), the Court found that insurance transactions constituted interstate commerce:

> "We may grant that a contract of insurance, considered as a thing apart from negotiation and execution, does not itself constitute interstate commerce .... But it does not follow from this that the Court is powerless to examine the entire transaction, of which that contract is but a part, in order to determine whether there may be a chain of events which becomes interstate commerce ... In short, a nationwide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature. Were the rule otherwise, few businesses could be said to be engaged in interstate commerce."

322 U.S. at 547. While *South-Eastern Underwriters* involved interpretation of federal antitrust legislation, its decision on the interstate commerce issue very clearly was intended to apply as a limitation on state power. *Furst v. Brewster*, *supra*, one of the progeny of *Dahnke-Walker*, was approvingly cited, 322 U.S. at 547 n. 26,

and Chief Justice Stone pointed out that the majority holding did not find Congressional power because of the effect on commerce but because "the contracts are themselves interstate commerce." 322 U.S. at 570 (Stone, C.J., dissenting). The later case of *State Bd. of Insurance v. Todd Shipyards*, 370 U.S. 451, 452 (1962), expressly affirmed the previous finding that the modern business of insurance is "interstate commerce," with the implications that that holding had as a limitation on state power. *Cf. Flood v. Kuhn*, 407 U.S. 258, 282 (1972) ("Professional baseball is a business and it is engaged in interstate commerce.")

And, in *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949), the Court invalidated a New York milk licensure law because of the effect it had on interstate commerce. Noting that "[o]ur system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation," the Court concluded no foreign state through statute or regulation can exclude such a person. "Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any." 336 U.S. at 539.

The modern rule, developed from the cases discussed, is that where one purchases goods in one state for transportation to another, the interstate commerce transaction includes the purchase as well as the transportation. If the transportation is incidental to the buying or selling, it is immaterial whether the transportation takes place before or after the sale or whether delivery for transportation is made to a common carrier, a private carrier, or to the purchaser for transportation himself. Thus, for example, when a seller of meat delivers to a purchaser at the plant,

and the purchaser is to promptly transport the meat across state lines, the sale itself is part of interstate commerce. See *Bruhn's Freezer Meats v. United States Department of Agriculture*, 438 F.2d 1332, 1339-40 (8th Cir. 1971). The Eighth Circuit's decision in *Bruhn's Freezer Meats* cites approvingly and relies heavily on both *United States v. Rock Royal Co-op*, 307 U.S. 533, 568-69 (1938) and *Dahnke-Walker*, indicating the continued vitality of the interstate commerce concept as expressed in those cases.

The negotiations in this case, where the contract is part of interstate commerce, are themselves interstate commerce. 17 W. Fletcher, *Cyclopedia Corporations* 318 (1960). And "the character of commerce does not depend upon the place of final ratification of the contract." *Id.* at 320. Indeed, Fletcher, far from negating the principle in *Dahnke-Walker*, often restates its holding. For example, he says that "[i]t is well settled that constitutional and statutory provisions regulating the doing of business in the state by foreign corporations do not apply to transactions in interstate commerce . . .," citing *Dahnke-Walker*. 17 W. Fletcher, *Cyclopedia Corporations* 589-99 and n. 72 (1960). He notes elsewhere that the qualification statutes "are not applicable to foreign corporations engaged in interstate or foreign commerce . . ., for if construed as applicable to such corporations, the statutes would be unconstitutional." *Id.* at 504. And, citing *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914) and *International Textbook Co. v. Pigg*, 217 U.S. 91 (1910), Fletcher concludes that with isolated exceptions a "foreign corporation cannot be denied the right to sue nor can conditions be imposed on the right to sue, on a cause of action based on a transaction involving interstate commerce . . ." *Id.* at 405 and n. 45.[6]

[6]Fletcher at one point states that qualification statutes do not apply to foreign corporations doing interstate commerce. Then citing Union Broker-

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Appellee's Motion to Dismiss or Affirm, at page 13, quotes a portion of section 8415, to the effect that a purchase is not interstate commerce where the transaction is complete before interstate commerce begins. But Appellee picks and chooses with remarkable discernment which sentences of that section to cite. He omits the immediately prior sentence, two subsequent sentences, and some relevant footnotes. The full section reads as follows:

> "The purchase of goods by a foreign corporation for shipment to another state constitutes interstate commerce,[48] and the commerce includes the purchase quite as well as it does the transportation.[49] A mere purchase in the state, however, without a shipment outside the state, does not constitute interstate commerce,[50] and a purchase is not one in interstate commerce where the transportation is complete before interstate commerce begins, and the purchase makes no provision as to shipment to the foreign corporation outside the state.[51] If there is no intention to take the property outside the state, or to resell it outside the state, the transaction is not one in interstate commerce,[52] although it is immaterial that a small portion of the goods is actually resold within the state."[53] The regular course of business of the foreign corporation, in connection with such purchases, as to shipment of purchases outside the state, fixes and determines the interstate character of the transaction.[54] The mere fact that the purchase is

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age Co. v. Jensen, 322 U.S. 202 (1944), he notes that "there are indications that interstate commerce may no longer serve as a barrier to qualification." 17 W. Fletcher, Cyclopedia Corporations 387 (1960). This statement reflects the understandable ambiguity left by Union Brokerage case, discussed infra, but it was written before this court's clarifying decision and limitation of that case in Eli Lilly and Co. v. Sav-on-Drugs, 366 U.S. 276 (1961).

> f.o.b. cars in the state does not prevent the purchase from being one in interstate commerce.[55] Purchases in the state by a branch office of the foreign corporation are not transactions in interstate commerce.[56]

Thus, Fletcher recognizes, citing *Shafer*, that the purchase of goods by Allenberg for shipment out of Mississippi is interstate commerce, and the commerce includes the purchase as well as the actual transportation. In support of this proposition, Fletcher cites *Dahnke-Walker* as "a leading case on this question." 17 W. Fletcher, *Cyclopedia Corporations* 374 n. 491 (1960). Fletcher also notes, as the court in *Cone Mills Corp.* did, that the regular pattern of business practice with regard to such purchases determines the interstate character of the entire transaction, citing *Lemke*. 17 Fletcher at 376 and n. 54. And the intention of the purchaser at the time of the purchase to make resales outside the state is controlling on the question of interstate commerce. *Id.* at 375 nn. 51 and 52. *Cf. Sprout v. South Bend*, 277 U.S. 163, 168 (1928). (In determining whether a transaction is in interstate commerce, "[t]he actual facts govern. For this purpose, the destination of the passenger when he begins his journey and known to the carrier, determines the character of the commerce.") The record here shows that all Allenberg's cotton purchases were for interstate resale (A-96). And, as the court found in *Cone Mills Corp.*, and as reported by the U.S. Department of Agriculture, virtually all of the cotton grown in Mississippi is shipped out of state. *U.S.D.A. Supp. for 1972 to Bulletin No. 417 - Statistics on Cotton and Related Data* 1930-1967, pp. 58, 77. *Cf. Lemke v. Farmers' Grain Co.*, 258 U.S. 50, 53-55 (1922). The course of trade is thus clear; the intent of the purchaser is established; and at least the constructive notice of the seller is manifest since virtually all cotton produced

in Mississippi is shipped in interstate commerce. From the totality of the circumstances, there can be but one conclusion: the entire transaction was in the stream of interstate commerce—negotiation, purchase, sale and shipment. This is the reality of the trade, as recognized by Congress for many years, by this court long ago, by the federal court on the scene in Mississippi, and by the trial court herein.

Despite the overwhelming authority for defining interstate commerce as a dynamic process that includes all the component elements of an interstate transaction—an almost uniform holding at least since the decision in 1937 in *Jones & Laughlin Steel*—there may be some question of the relevancy of two state taxation cases decided in 1934. *Chassaniol v. City of Greenwood*, 291 U.S. 584 (1934) (occupation tax on every person engaged in the business of buying or selling cotton for himself within the city); *Federal Compress Co. v. McLean*, 291 U.S. 17 (1934) (state excise tax on operating a cotton compress).

In *Pike v. Bruce Church*, 397 U.S. 137, 141 (1970), the Supreme Court indicated that the basis for the holdings in *Federal Compress* and *Chassaniol* was unclear. Speaking for a unanimous Court, Justice Stewart observed that the decisions could be construed as holding that the activities taxed took place before interstate commerce began, or they could be seen as deciding that the burden upon commerce was at the most indirect and remote. Justice Stewart went on to find that the actions of Arizona in *Pike* affected interstate commerce, regardless of the view taken of *Federal Compress* and *Chassaniol*.

In light of subsequent developments in Commerce Clause doctrine, it is probably wiser to view those cases as holding that there was a burden on interstate commerce, but

that the burden was indirect and therefore not unconstitutional. This is the second alternative articulated by Justice Stewart in *Pike* and would conform more nearly to subsequent Commerce Clause developments after *Jones and Laughlin Steel*. But facts of the instant case are distinguishable even assuming the continued vitality of the "mechanical test" of *Federal Compress* and *Chassaniol*. See *generally Parker v. Brown*, 317 U.S. 341, 360-61 (1943).

In *Townsend v. Yeomans*, 301 U.S. 441 (1937), in which regulations on the handling and selling of tobacco were upheld, the Court clearly indicated that the regulation affected commerce but found the burden indirect and thus constitutional. Nevertheless, the Court drew an analogy to *Federal Compress* and *Chassaniol* because the warehouses were regulated in their dealings with the farmers but not in their dealings with buyers from out of state to whom the warehousemen sold tobacco. 301 U.S. at 457-58. *Federal Compress* and *Chassaniol*, thus are better understood as cases in which indirect burdens on interstate commerce were upheld. *Cf. Pike*, 397 U.S. at 141.

Of course, whether or not the effect of any particular burden on interstate commerce is direct and therefore unconstitutional requires the court to weigh competing interests and values. But the modern Commerce Clause cases such as *Wickard v. Filburn, supra*, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) and *Katzenback v. McClung*, 379 U.S. 294 (1964), indicate that a restrictive interpretation of the scope of the federal commerce interest is inconsistent with prevailing understanding and realities. *Cf. Perez v. United States*, 402 U.S. 146 (1971) (Upheld power of Congress in Consumer Credit Protection Act to forbid extortionate extension of credit.) A conclusion that interstate commerce was not involved

in the transactions herein would directly conflict with Congressional findings which are entitled to great judicial deference. See *State Bd. of Insurance v. Todd Shipyards*, 370 U.S. 451, 456 (1962). Besides, such a view would ignore the subsequent developments in the area of state taxation. Recent tax cases make it clear that a state has the power to impose a tax on interstate commercial activities provided that the tax is not discriminating against interstate commerce and not excessive in relation to the governmental benefit conferred by the state. See *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959). That is, the state can require interstate commerce to bear its fair share of the tax burden, but the tax must have a rational relationship to the value of the governmental services conferred. *Evansville-Vanderburgh Airport Authority District v. Delta Air Lines*, 405 U.S. 707, 715-16 (1972).

In *United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973), the Supreme Court upheld the constitutionality of an Illinois general revenue use tax as applied to aviation fuel stored in Illinois and then loaded aboard aircraft there and consumed in interstate flight. Relying on two 1933 taxation cases, *Edelman v. Boeing Air Transport, Inc.*, 289 U.S. 249 (1933), and *Nashville, Chattanooga and St. Louis R. Co. v. Wallace*, 288 U.S. 249 (1933), Justice Blackmun drew a distinction between a state tax on consumption of fuel, which would be impermissible as a direct burden on interstate commerce, and the Illinois tax on storage and withdrawal of fuel, which "does not place an unconstitutional burden on interstate commerce." 410 U.S. at 629. Importantly, the Court recognized that both kinds of taxation affected interstate commerce, but concluded that the tax on consumption was excessively burdensome because of the risk of multistate taxation of interstate commerce.

Thus, in *United Air Lines* the Court viewed *Edelman* and *Nashville* as cases involving an indirect and remote burden on interstate commerce. Contra: *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 176 (1939). Yet these two cases certainly lend themselves to the same analytical ambiguity as *Federal Compress* and *Chassaniol*. That is, they can be seen either as holding that the tax was on intra state commerce or constituted an indirect burden on interstate commerce. The modern and analytically preferable approach is to interpret the scope of interstate commerce broadly and then to determine whether the effect on such commerce is excessively burdensome. See *Evco v. Jones*, 409 U.S. 91 (1972).

Language in *Federal Compress* itself indicates that the balancing approach was the one employed by Justice Stone. He noted that property withdrawn from transportation, "whether intrastate or interstate, until restored to a transportation movement interstate, has often been held subject to local taxation." 291 U.S. at 21. He concluded that the privilege tax created an indirect and remote burden on interstate commerce and therefore did not transgress constitutional limitations. 291 U.S. at 22. *Cf. Edelman*, 289 U.S. at 252; *Nashville*, 288 U.S. at 267. It is this balancing analysis that most nearly conforms to the subsequent developments in Commerce Clause jurisprudence and should be applied herein, despite some admittedly confusing references to taxation of intrastate activity in *Federal Compress*, *Chassaniol*, *Edelman* and *Nashville*. In *United Air Lines* Justice Blackmun acknowledged that this area of state taxation law is cloudy and complicated, but he went on to attribute this primarily to "the varied nature of interstate activities" which make line drawing difficult. 410 U.S. at 629. From that statement, it would appear that this Court now views the early state

tax cases as involving or affecting interstate commerce but not so directly or burdensomely as to be unconstitutional.

Moreover, tax cases raise somewhat different and specialized issues. See *Lemke v. Farmers' Grain Co.*, 258 U.S. 50, 55 (1922). Interstate commerce is not immunized from bearing its fair share of taxation, provided the tax is non-discriminatory and equitably apportioned. See B. Schwartz, *Constitutional Law* 121-22 (1972); *Cf. Eli Lilly & Co. v. Sav-on-Drugs, Inc.*, 366 U.S. 276, 289 (1961) (Douglas, J., dissenting); *Evansville-Vanderburgh Airport Authority*, *supra*; *United Air Lines*, *supra*. As the Court has said, the state has a legitimate and important interest in securing revenue from activities that derive governmentally conferred benefits. At the same time, the Court will be vigilant to minimize the danger of double taxation of interstate commerce. The objective is to achieve fiscal fairness so that businesses contribute for the maintenance of such governmental services as police and fire protection, maintenance of access roads, and maintenance of instrumentalities of interstate commerce. See *United Air Lines*; *Evansville-Vanderburgh Airport Authority*. Since taxation is the only means of raising revenue, state taxation cases are somewhat *sui generis* and must be decided on an *ad hoc* basis. Even in the taxation area, however, Justice Frankfurter often warned of the potential dangers of state intrusion on federal interests. For example, in *Freeman v. Hewit*, 329 U.S. 249 (1946), in determining the limitations on a state income tax, the Court found an impediment on the "currents of commerce across the State line, while the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce." 329 U.S. at 254. Yet in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), the Court upheld a fairly apportioned tax concededly on interstate activities..

These tax cases reflect the difficulty the Court has had in accommodating state revenue interests with federal interests in preserving an integrated national marketplace. See *Freeman v. Hewit*, 329 U.S. at 252. The states have legitimate claims on interstate commerce to pay its fair share of local costs, and governmental revenue, for better or worse, must derive from some form of taxation. Local interests are therefore served only when revenue can be collected (though there are of course different types of taxation), and this then brings about the delicate balancing this Court has undertaken: to minimize the danger of double or excessive taxation while simultaneously allowing the states a source of revenue "having a relation to the event taxed." *United Air Lines v. Mahin*, 410 U.S. at 630. The goal is to achieve a "fair result."

In this section, *amicus* is urging that the transaction involved herein be declared in interstate commerce. The question whether this is then an undue burden on commerce is addressed in the next section. While the tax cases are decided within a Commerce Clause framework, the outcome often turns on different factors, enumerated above *Federal Compress* and *Chassaniol* must be viewed with these considerations in mind.[7]

[7]It is instructive in this regard to examine the concurring opinions of Justice Harlan in **Northwestern States Portland Cement Co. v. Minnesota**, 358 U.S. 450, 468 (1959) (Harlan, J. concurring) and **Eli Lilly and Co. v. Sav-on-Drugs, Inc.**, 366 U.S. 276, 284 (1961) (Harlan, J. concurring). **Northwestern Cement** held that a state could constitutionally tax net income from the exclusively interstate operations of a foreign corporation. Justice Harlan's concurrence expressly rejects the view that prior cases allowed state taxation only on interstate business. 358 U.S. at 466. He concluded that this was "both novel doctrine and unreal analysis...because this Court has never held that activities...performed solely in aid of interstate sales, are intrastate Commerce." **Id.** at 468. In **Eli Lilly**, however, Justice Harlan explicitly noted that the basis for exerting state regulatory authority (qualification to do business) was that the activity of the foreign corporation was localized and wholly separate from interstate commerce. 366 U.S. at 285, 287. His clear understanding is that a qualification requirement for interstate transactions would be unconstitutional, even though a tax might pass muster.

In any event, even assuming the relevance of the tax cases and the ongoing vitality of the "mechanical test" of *Federal Compress* and *Chassaniol*, they are distinguishable on their facts from the situation involved in the present controversy and certainly cannot support the conclusion that the transaction herein was not in or did not affect interstate commerce.

As the court in *Pike* noted, the early Mississippi cases involved cotton that had come to rest in Mississippi, and "[b]efore shipping orders [were] given, it [had] no ascertainable destination without the state." 291 U.S. at 21. In *Pike* Arizona had imposed certain packing standards on cantaloupes grown in the state. The grower, however, sought to send the cantaloupes to its packing plant outside the state, and therefore the Court noted that they "were destined to be shipped to an ascertainable location in California immediately upon harvest." 397 U.S. at 141. Likewise, Allenberg bought the cotton here in question for the purpose of shipping it to its customers without the state of Mississippi. Justice Stewart's citation of *Lemke* and *Shafer* in support of his conclusion indicates the Court's continued reliance on their view of interstate commerce.

Not only didn't the cotton in *Federal Compress* and *Chassaniol* have an ascertainable destination outside the state at the time the tax was levied, but indeed there had not yet been an interstate transaction of any kind. The Court in *Dahnke-Walker*, *Lemke*, and *Shafer* held that an interstate purchase for transportation across state lines constitutes an interstate transaction, but in *Federal Compress* and *Chassaniol* there had been no interstate sale at the time the tax became due. The Court in *Chassaniol* makes this point explicitly, 291 U.S. at 587:

> Ginning cotton, transporting it to Greenwood, and warehousing, buying and compressing it there, are each,

> like the growing of it, steps *in preparation for the sale* and shipment in interstate or foreign commerce. But each step *prior to the sale* and shipment is a transaction local to Mississippi . . .
> (Emphasis supplied)

The critical significance of this distinction is made manifest in *Parker v. Brown*, 317 U.S. 341 (1943), where the Court applied the "mechanical test" of *Chassaniol* to a California statute that restricted the marketing of raisins. The Court observed that a state could tax a sale where the purchaser ultimately intended to resell in interstate commerce if the original transaction were itself intrastate. That is, the Court found that no case had held that a state could not regulate the sale of an article within the state because the buyer, after processing and packing would sell and ship that article in interstate commerce. Importantly, however, the Court in *Parker* noted that before the packing and processing of raisins they were not in the stream of commerce. On this very basis, the Court distinguished *Lemke* and *Shafer*, as the Court subsequently did in *Pike*, on the ground that the regulation in those cases was of purchasers of grain within the state for immediate shipment out of state without resale or processing. For that reason the purchase itself in *Lemke* and *Shafer* was a part of commerce. 317 U.S. at 361. Similarly, the contracts in the instant situation expressly identify Allenberg as the purchaser. The forward contract between defendant and Allenberg was itself a transaction in interstate commerce, and it was clear that Allenberg, the purchaser, was going to transport the cotton into another state as soon as practicable after it obtained legal possession. There was no processing in Mississippi while the cotton was in Allenberg's possession; users of Mississippi cotton are almost invariably located outside of Mississippi. Even if ginning and compressing be deemed

processing, that was carried out before delivery of the cotton to Allenberg and therefore was not carried out by it or under its supervision. (A-7, ¶3). Moreover, from the outset the cotton has a destination outside Mississippi, and that location became specifically ascertainable as soon as the grade and staple length of the cotton were determined by government classifiers. For these reasons, the situation in the present case is distinguishable from *Federal Compress* and *Chassaniol*. See *Cone Mills Corp.*, 369 F. Supp. at 436-37.

There may also be some question of the relevance of the recent decision in *Kosydar v. National Cash Register Co.*, 42 U.S.L.W. 4767 (U.S. May 20, 1974), which involved the validity of a state taxation statute under the Import-Export Clause, Article I, §10, clause 2. *Kosydar* represents both the differences between Commerce Clause and Import-Export Clause analysis and the differences between taxation and regulatory measures.

Justice Stewart in *Kosydar* recognized that by its terms the prohibition on state taxation contained in the Import-Export Clause is absolute: "no duties or imports are allowed 'except what may be absolutely necessary for executing [a state's] inspection laws.'" 42 U.S.L.W. at 4768. A conclusion that a commodity has entered the stream of export thereby immunizes it automatically from state taxation. The Import-Export Clause is designed to promote uniformity throughout the nation. Thus, even Congress is constrained by Article I, §8, Clause 1 to impose duties and imports uniformly throughout the country. This uniformity is important to prevent unwanted competition among states and to enable the United States to present a united front in foreign trade affairs. In *Kosydar* the Court granted certiorari "because the case involved important questions touching the accommodation of state and

federal interests under the Constitution." 42 U.S.L.W. at 4768. It is understandable, then, that given the absolute prohibition on state taxation imposed by the Import-Export Clause, the Court would be extremely sensitive to the need to narrow the definition of "export" so as to protect only those federal interests underlying the clause.

For this reason, imposition of a strict threshold test for determining when a commodity enters the stream of export is appropriate. A broader interpretation necessarily would mean rigid limitations on state revenue raising powers, and as Justice Frankfurter noted, the purpose of the Import-Export Clause was "not to relieve property eventually to be exported from its share of the cost of local services." *Joy Oil Co. v. State Tax Commission*, 337 U.S. 286, 288 (1949), cited in *Kosydar*, 42 U.S.L.W. at 4769-70. No similar absolute rule exists with respect to interstate commerce. State power with an indirect effect on commerce has long been held constitutional, *Pike v. Bruce Church*, 397 U.S. 137 (1970), and states are constitutionally entitled to tax net revenues derived from interstate business, provided they are fairly apportioned, not discriminatory and not excessive. See *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959). Moreover, federal interests in commerce are broader, and it is reasonable that threshold definitions of interstate commerce will be broader, especially since the impact of such a finding is not generally conclusive in limiting state power.

Kosydar, like *Federal Compress* and *Chassaniol*, is a taxation, not a regulation case. National Cash Register has its corporate headquarters in Dayton, Ohio and the warehouse was located there as well. To a great degree

it had localized its business and drew heavily on the services of the community. *Cf. Union Brokerage Co. v. Jensen*, 322 U.S. 202 (1944). As Justice Blackmun pointed out in *United Air Lines v. Mahin, supra*, a state has a substantial interest in securing revenue for service rendered to a corporation, and allowance of the Ohio state tax in *Kosydar* would not defeat the federal interest in uniformity nor discriminate against exports.

An analogous issue could arise if the case under review involved an attempt by Mississippi to tax Pittman's cotton while in its possession at the compress. It might be a reasonable and equitable accommodation of federal and state interests if such a tax were exacted (though Mississippi specifically exempts cotton in the possession of producers from personal property taxation for a period of two years subsequent to harvest). (Miss. Code 1942 Ann. §9697 (i).) But that is not what is involved in this case. Rather the question is the enforceability through suit of an admittedly valid contract. The comparable situation in *Kosydar* would be the following: the foreign corporation negotiates a deal with National Cash Register (NCR); an officer of the foreign corporation flies to this country to close the deal by signing a contract at NCR's headquarters in Dayton, Ohio for delivery of the contracted machines nine months hence; because it can sell its machines to another prospective customer at a higher price, NCR refuses to deliver and claims that the foreign corporation, which had not qualified to do business in Ohio *at the time the contract was signed*, cannot maintain an action on its otherwise valid contract. Statement of the above case demonstrates the very different considerations in a tax case like *Kosydar* and those involved herein. It is almost inconceivable that this Court would deny the foreign corporation in *Kosydar* access to an American

judicial forum to enforce the contract in the previous hypothetical. For the same reasons, the ability of Allenberg to sue on its contract should now be vindicated.

Although the Supreme Court's decision in *Eli Lilly Co. v. Sav-on-Drugs, Inc.*, 366 U.S. 276 (1961), is characterized by such a different factual situation from the case herein, some mention should be made of that ruling because the underlying issues bear similarity. In *Lilly* the Court upheld the application of a New Jersey statute that required a foreign corporation doing interstate business to obtain a certificate of authority in order to maintain an action in a state court. Lilly, an Indiana corporation dealing in pharmaceutical products, manufactures and sells these products in interstate commerce to certain selected wholesalers in New Jersey. These wholesalers then sell the Lilly products in intrastate commerce to New Jersey hospitals, physicians, and retail drug stores, and these retail stores in turn sell them, again in intrastate commerce to the general public. 366 U.S. at 278. Lilly operated an office in New Jersey with eighteen "detailmen", whose job it was to visit retail pharmacists, physicians and hospitals in order to acquaint them with the products of the company and to encourage them to use Lilly's products. These detailmen serve a promotional function and sometimes even take an order but in all cases the ultimate sales to the customers visited by the detailmen are made by the wholesalers who have bought from Lilly.

The facts of *Lilly* are so strong that the majority found that "[t]o hold . . . that plaintiff [Lilly] is not doing business in New Jersey is to completely ignore reality." 366 U.S. at 280.[8] Nevertheless, four justices dissented on

[8]Note, however, that New Jersey's qualification statute, unlike Mississippi's had a saving provision for subsequent qualification.

even those strong facts for fear of inhibiting a robust flow of interstate commerce. Furthermore, Justice Harlan, concurring, expressly stipulated that if Lilly were to fill directly the orders drummed up by its detailmen that that activity would be interstate commerce and not subject to state regulation or licensure. 366 U.S. at 286. But the promotional function performed by the Lilly detailmen involved them deeply in the everyday intrastate commerce of the state of New Jersey, and the Court held that the state was under those circumstances entitled to require the corporation to qualify to do business if it were to maintain an action in state court.

The facts of the instant case are hardly comparable to those in *Lilly*. Allenberg is an out of state corporation that was purchasing cotton by forward contract with cotton growers for sale to customers all located outside the state of Mississippi. Allenberg did not employ a sales force to promote intrastate sales of its products, and its entire function is the promotion of and facilitation of interstate commerce in cotton. Its activity is hardly localized in Mississippi and the factual reality more nearly comports with Justice Harlan's statement in *Lilly* that a foreign corporation need not qualify when selling directly interstate.

Justice Holmes once remarked that "interstate commerce is a practical conception." *Eureka Pipe Line v. Hallanan*, 257 U.S. 265, 272 (1921). As a practical matter and also as a matter of principle, the totality of the circumstances shows that the transactions in the instant case were in interstate commerce and significantly affected such commerce. The consequences of any other holding herein would risk the most serious curtailment of federal interests in an area in which federal regulation has been pervasive and deemed necessary to safeguard national concerns in

agricultural marketing. The facts, as stated by Congress in 7 U.S.C. §2101, indicate that interstate commerce is involved, and controlling Supreme Court precedent in *Dahnke-Walker* and subsequent cases supports this view.

C. *Determining the Validity of §5309-221 and §5309-239 Under the Commerce Clause*

Once the court concludes that the transactions involved in this case were in or affected interstate commerce, a constitutional analysis requires a determination whether the state statute as applied has such an insubstantial or indirect effect on such commerce as to withstand scrutiny under the negative force of the Commerce Clause.

1. *As Applied to This Case, §5309-221 and §5309-239 by Their Necessary Operation Unconstitutionally Impose a Direct Effect on Interstate Commerce.*

The Supreme Court's decision in *Dahnke-Walker* is not only determinative on the issue of defining interstate commerce, it is also conclusive with regard to the consequences of a finding that there is interstate commerce. As the Court there held, 257 U.S. at 291:

> A corporation of one state may go into another without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the Commerce Clause.

The *Dahnke-Walker* Court noted that the Tennessee corporation had purchased grain in Kentucky at other times and had a prior practice of purchasing for shipment to its plant in Tennessee. The Court found the Kentucky requirement that the Tennessee corporation qualify to do business in Kentucky excessively burdensome on commerce and held that "direct" effect unconstitutional.

The decision in *Dahnke-Walker* relied on well-developed precedent. In the so-called "drummer" cases it had been established that a corporation is entitled to send salesmen

into a foreign state to promote direct interstate trade without interference by regulations imposed by that state. See *Robbins v. Shelby County Taxing District*, 120 U.S. 489 (1887). This principle was forcefully reaffirmed in the majority and concurring opinions in *Lilly*. 366 U.S. at 278-79, 284-85. In *Crutcher v. Kentucky*, 141 U.S. 47 (1891), the statute prohibited an agent of a company, which was not incorporated in Kentucky, from carrying on business without first obtaining a license from the state. The Court struck down the statute holding that a state cannot require a license for carrying on interstate business, unless Congress should see fit to interpose some other regulation on the subject matter. 141 U.S. at 57. The Court in *Crutcher* referred to the standards set out in *Cooley v. Board of Port Wardens*, 53 U.S. 299 (1851), acknowledging that some state police power regulations might be permissible even if they had an indirect effect on commerce, but went on to note that the effect of such regulations must be local in character in order to be sustained. 141 U.S. at 58.

Crutcher was followed in *Western Union Telegraph Co. v. Kansas*, 216 U.S. 1 (1910), where the Court invalidated a statute requiring a foreign corporation to pay a tax in order to do business in Kansas. While recognizing that some type of local regulations affecting commerce might pass muster, 216 U.S. at 26, citing *Cooley*, the Court held that:

> a corporation of one State, authorized by its charter to engage in lawful commerce among the States, may not be prevented by another State from coming into its limits for all the legitimate purposes of such commerce. It may go into the State without obtaining a license from it for the purposes of interstate business . . .

The Court further noted that a benign legislative purpose would not save a statute if by its necessary operation it had an unconstitutional effect on interstate commerce. "If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted . . ." 216 U.S. at 27.

Another Kansas statute was held unconstitutional in 1910. The statute, similar in operation to the Mississippi statute here when viewed narrowly as the Mississippi Supreme Court has done, required a foreign corporation to qualify before doing business in Kansas, and any corporation doing business without authorization could not maintain any action in state court. See *International Textbook Co. v. Pigg*, 217 U.S. 91 (1910).

International Textbook offered correspondence courses from its office in Scranton, Pennsylvania. It had a local traveling agent who procured business and forwarded enrollments to Scranton. The Solicitor in Kansas operated an office there at his own expense. Under the terms of the Kansas statute, International Textbook was found to be doing business. The Court found that the business was in interstate commerce and then proceeded to determine whether the statute by its necessary operation materially or directly burdened International Textbook's interstate business. In analyzing whether the effect was "direct", the Court observed that filing a detailed statement was a condition precedent to authorization for a foreign corporation to do business in Kansas. The statute denied a corporation access to the courts unless it first obtained certification. 217 U.S. at 107-08. The Court concluded that a state is not competent to impose the duty to register on a foreign corporation as a condition precedent. Even

though no formal license was required, the effect was the same: "[I]t imposes a *condition* upon a corporation of another State seeking to do business in Kansas, which in the case of interstate business, is a regulation of interstate commerce and directly burdens such commerce." 217 U.S. at 111. The Court noted that courts serve as an alternative to resolving conflict through force, and if a state cannot require filing it certainly cannot bar access to its courts to a foreign corporation engaged in interstate commerce. *Id.* at 112. *Cf. Mitchell v. W. T. Grant*, 42 U.S.L.W. 4671, 4677 (U.S. May 13, 1974).

In *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914), another broad state statute regulating foreign corporations was declared unconstitutional. A South Dakota statute barred foreign corporations from transacting business within the state or from maintaining any action in any state courts until it filed a copy of its charter and designated an agent for purposes of service of process. *Id.* at 200. An Iowa corporation shipped merchandise to a South Dakota corporation under a contract entered into in South Dakota. The state court held that the Iowa corporation could not maintain an action on its contract since it had not subjected itself to the jurisdiction of the South Dakota courts. On appeal this Court addressed the question whether the statute, as construed by the state court, by its necessary operation materially or directly burdened interstate commerce. *Id.* at 200-01. The Court concluded that the right to enforce payment on a contract (or delivery in the case of Allenberg) was so closely related with commerce and so essential to the existence and continuance of such commerce that the imposition of these conditions necessarily constituted a direct restraint on interstate commerce. *Id.* at 202-03. Thus, when a corporation goes into a state to enforce a contract, a state cannot interfere consistent with the Commerce Clause.

> "If it were otherwise, the purpose of the constitution to secure and maintain the freedom of commerce by whomsoever conducted could be largely thwarted by the States and the commerce itself seriously crippled. . . . If one State can impose such a condition others can, and in that way corporations engaged in interstate commerce can be subjected to great embarrassment and serious hazards in the enforcement of contractual rights directly arising out of and connected with such commerce."

235 U.S. 197. *Cf. Adams Express Co. v. New York*, 232 U.S. 14, 31 (1910).

In *Furst v. Brewster*, 282 U.S. 493 (1931), a case decided a decade after *Dahnke-Walker*, the Supreme Court expressly relied on the line of cases just discussed. *Furst* involved an Arkansas statute that denied any foreign corporation the right to sue in state court unless it filed a copy of its articles of incorporation and a financial statement, and designated a local agent upon whom process could be served. Furst was an Illinois corporation which shipped goods from a location in Memphis, Tennessee, to Brewster, who lived in Arkansas. Noting that the ordering and shipping of the goods was interstate commerce, the Court found that "according to established principle," any state statute that imposes a direct burden on interstate commerce is void under the Commerce Clause.

> Accordingly, when a corporation goes into a State other than that of its origin to collect, according to the usual or prevailing methods, the amount which has become due in transactions in interstate commerce, the state cannot, consistently with the Commerce Clause, obstruct the attainment of that purpose.

282 U.S. at 498.

The rule derived from *Furst*, *Dahnke-Walker*, *Sioux Remedy*, *International Textbook*, *Western Union Telegraph*, *Crutcher*, and *Robbins* is that broad licensure and qualification requirements applied to interstate transactions of foreign corporations directly burden interstate commerce by their necessary operation and are therefore in violation of the Commerce Clause. The continuing vitality of that principle was explicitly reaffirmed in the *Lilly* case where, citing *Crutcher*, *International Textbook*, and *Sioux Remedy*, the Supreme Court acknowledged that "[i]t is well established that [a state] cannot require [a foreign corporation] to get a certificate of authority to do business in the State if its participation in this trade is limited to its wholly interstate sales . . ." 366 U.S. at 278 & n. 7. From this it can readily be seen that the interstate commerce exemption contained in §5309-221(e) Miss. Code 1942 Ann., as adapted from the Model Act, is constitutionally mandated. See *Cone Mills Corp. v. Hurdle*, 369 F. Supp. at 432. As a consequence, since the federal constitutional interests shaped the state statutory provision, *cf.* §5309-312 Miss. Code 1942 Ann., these interests must be preserved, even as against restrictive interpretations of state law.

The Supreme Court has acknowledged that by their nature certain kinds of state restrictions constitute almost *per se* violations of the Commerce Clause. See *Pike v. Bruce Church*, 397 U.S. 137, 145 (1970). The conclusion to be drawn from the cases discussed in this section and from the response contained in §124 of the Model Business Corporation Act is that a comprehensive qualification requirement as a condition for maintaining an action in state court, where the action arises out of an interstate transaction, is by its nature a direct burden on interstate commerce because so intimately connected with the right of a foreign corporation to have access to local markets free of local

controls. *Cf. Lilly*, 366 U.S. at 285 (Harlan, J., concurring). Since, as *amicus* has argued, the underlying transactions herein were in and affected interstate commerce, it necessarily follows that the state is not constitutionally permitted to bar plaintiff from the Mississippi courts to enforce its concededly valid contracts. By its nature the qualification requirement, as applied to an interstate transaction, necessarily affects interstate commerce "directly" and is therefore invalid under the Commerce Clause. If in this situation the qualification requirement is void then the bar of access to the courts must also fall. See *International Textbook*, 217 U.S. at 112.

The previously discussed cases, however, do not establish that all state regulation of foreign corporations is invalid. See *Lilly* (state can require a foreign corporation to qualify to do intrastate business). Where the state has particularized interests, local in character, they can act under the police power, provided that the effect of the state statute is not such as to materially or directly affect interstate commerce. The Court's decisions in cases like *Lemke* and *Shafer*, discussed in the section defining interstate commerce, reflect the Court's conclusion on an *ad hoc*, case by case basis of the relative importance of the local versus the national interests at stake. For example, in *Lemke* and *Shafer* the Court found it determinative that over 90% of the grain produced in North Dakota was shipped in commerce out of state. For that reason, the impact of the North Dakota regulatory scheme on interstate commerce was significant. Indeed, that factor was seen in a later case as a distinguishing characteristic when the Court upheld a milk regulatory statute in a state where only 10% of the milk traveled in interstate commerce. See *Milk Control Board v. Eisenberg*, 306 U.S. 346 (1939).

Thus, there is a significant area of state power, even where state action might have some indirect and inconse-

quential impact on interstate commerce. However, as the Court stated in *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 780 (1945):

> "The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation is not to be avoided by 'simply invoking the convenient apologetics of the police power.'"

The cases that have upheld the exercise of state power examine the character of the local interest involved and weigh local and national interests, sometimes in a frank balancing process. See *Pike*, 397 U.S. at 142; *Southern Pacific*, 325 U.S. at 770-71. But in cases sustaining state legislation, the particular state interest has been defined with great specificity. Thus, in *Huron Cement Co. v. Detroit*, 362 U.S. 440 (1960), the Court held constitutional a city smoke emission ordinance as applied to a ship when docked within the city. The Court found the ordinance an evenhanded regulation and the subject matter of legitimate local public concern, with the impact on interstate commerce not unduly burdensome. *Id.* at 443. Similarly, the Court has sustained local regulation over such specific subject matters as tobacco (*Townsend v. Yeomans*, 301 U.S. 441 (1937)), raisins (*Parker v. Brown*, 317 U.S. 341 (1943)), liquor transportation (*Duckworth v. Arkansas*, 314 U.S. 390 (1941)), interstate transportation (*California v. Thompson*, 313 U.S. 109 (1941)), and sale of insurance (*Robertson v. California*, 328 U.S. 440 (1946)). But in all those situations the state regulation was specifically aimed at a particularized local concern that might not draw the attention of a national legislative body. The state statutes involved were not general state regulatory measures

but narrowly tailored provisions to deal with localized problems relating to an individual industry. And even when such local interests are specifically regulated, the Court will engage in an independent review to weigh the local and national interests. Thus, despite the ruling in *Eisenberg, supra*, and its recognition of the "eccentric" localized character of the milk industry, the Court invalidated a New York milk licensure law because of its undue impact on interstate commerce. *H. P. Hood and Sons, Inc. v. DuMond*, 336 U.S. 525 (1949). Similarly, despite the states' primary and immediate concern with the safety of its highways, that interest cannot subvert the national interest in unencumbered interstate transportation. Compare *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938) with *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959).

The Court's decision in *Union Brokerage Co. v. Jensen*, 322 U.S. 202 (1944) represents both a similar and a different basis for sustaining local regulation. The Minnesota statute there involved was a broad regulatory measure, not the specific, particularized statutes as in the other cases mentioned above. But the Court in *Union Brokerage* noted that Petitioner's customhouse business operated in Minnesota much like any other corporation. It was localized within the state, it bought materials from people in the state, and entered into business relationships "wholly outside of the arrangements it makes with importers or exporters." 322 U.S. at 208. Union Brokerage could be required to qualify to do business for that portion of its operations that were intrastate, and the Court expressly found that it had many "dealings quite outside transactions immediately connected with import and export." *Id.* Since the business was so localized and had to have a wide variety of dealings with the people in the community, the Court found that the state had an interest in regulation

that outweighed the indirect impact of foreign commerce. The decision in *Union Brokerage* can be squared with the Court's ruling subsequently in *Lilly*, in which a general regulatory statute was upheld with respect to intrastate transactions of a foreign corporation.

Moreover, the *Union Brokerage* opinion makes it abundantly clear that where a foreign corporation comes into the state for the purpose of contributing to or concluding a unitary interstate transaction that it would be free of such comprehensive regulatory provisions. To make its point, the Court expressly cited approvingly its previous decisions in *Dahnke-Walker, Sioux Remedy* and *International Textbook*, 322 U.S. at 211. In addition, the *Union Brokerage* opinion placed emphasis on the understanding that the federal government implicitly recognized the legitimacy of and need for local supervision of customhouse brokers. In its regulations, the federal government allowed a customhouse broker in one federal district to transfer to another district provided that it was authorized to do business by the state or states where the other district was situated. For the Court, this was explicit recognition by the federal government of the need for local regulation and authorization of such state action. 322 U.S. at 209. For these reasons *Union Brokerage* is not inconsistent with the rule that comprehensive, general regulatory measures of foreign corporations involved in interstate transactions by their necessary operation have an impermissible substantial and direct effect on commerce.

2. ***The Actual Effect of §5309-221 and 249 as Applied Materially Burdens Interstate Commerce and Local Interests Can Be Promoted By Alternatives Which Affect Interstate Commerce Less Severely.***

Congress has often stated its belief that the market in agricultural commodities is national and even international

in scope. See, e.g., 7 U.S.C. §§3, 1621, 2101, 2301. As previously discussed, this is the view also held by Professor A. B. Cox, an expert on the cotton trade. There are 19 cotton-producing states in this country, and cotton purchasers frequently buy in the vast majority of these states during the course of business. As the Court acknowledged in *Wickard v. Filburn*, *supra*, small alterations in the terms of trade can have significant effects on overall markets. Allowing each cotton-growing state to require cotton purchasers to qualify to do business would put a significant burden on these buyers and make the access to local markets less free. Yet it is the reduction and elimination of artificial barriers to entry that brings about maximum economic efficiency.

Erection of bureaucratic obstacles of red-tape will reduce the numbers of potential purchasers in the market. Also, because of the time lag necessary to process qualification papers, new entrants into the market will be unable to transact business because of the unenforceability of contracts. The result will be that bigger firms may be able and find it worthwhile to qualify to do business, but smaller firms will not. This will mean that the big cotton buyers will have a more concentrated market position with respect to the sellers and will be better able to exercise this power in dealing with the producers. The predictable consequence of such a situation would be an increased concentration among buyers with more market power with respect to sellers. In turn these buyers would have more concentrated power on the national markets. The likely result would be lower prices for farmers in the long run and higher prices for consumers.

That this result is not fanciful gains support from a Congressional committee finding that there is a growing concentration of power in the hands of fewer and larger

buyers. This was the basis on which Congress enacted the Agricultural Fair Practices Act of 1967, 7 U.S.C. §2301 et seq. The Act excluded cotton from its coverage because it concluded that there was sufficiently active competition in that market so that the terms of the Act did not have to cover cotton transactions. See *U.S. Code Cong. & Admin. News*, 1968, p. 1869-70. But that situation could turn around quickly if impediments to free entry were permitted to arise.

Moreover, the Mississippi statute is not drawn with specific reference to cotton fraud. It is not particularized to any localized interest and therefore the national interests in maintaining an efficient private market, see 7 U.S.C. §1621, should prevail. Uniformity of regulation, under the control of a single authority, is vital to the smooth functioning of the marketing system, and local barriers to entry can have only pernicious effects.

In *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the Chief Justice recognized the importance for international trade of upholding freely bargained for contracts where there is no evidence of fraud or overreaching. Uncertainty about enforcement of contracts and barriers to the judicial forum have the most serious consequences in undermining trade and commerce. 407 U.S. at 13-14. Agricultural commodities provide the United States with a balance of trade surplus on world markets. If this Court gives the green light to states to impose absolute barriers to its courts to foreign corporations to enforce valid contract rights, it will endanger national interests in marketing agricultural commodities.

Moreover, the Mississippi statutes are far from neutral in their impact on foreign corporations. One of the most disfavored forms of state legislation is a statute that discriminates against interstate activity. *Pike v. Bruce*

Church, 397 U.S. 137 (1970). Under the Mississippi law a foreign corporation must already be qualified at the time a transaction is entered into in order to maintain an action. But if such a contract helps the Mississippi party, then it can fully enforce the contract against the foreign corporation. Thus, if this contract had been signed in 1972, when cotton prices fell, and Allenberg had sought to renege, Pittman could have successfully bound Allenberg to the terms of the contract. When the shoe is on the other foot, when the Mississippi resident seeks to renege, the foreign corporation is unable to use the courts at all. Good faith is no defense; fair dealing is irrelevant. The absolute barrier exists in all cases, even when the state's interest is defeated, not promoted, by its enforcement, as herein.

Furthermore, any interest that Mississippi seeks to promote by its qualification requirement and by barring access to its courts could be achieved in ways that have a lesser effect on interstate commerce. Of course, the state has a very important and legitimate interest in protecting against fraud. But prevention of fraud is not a magical incantation that automatically justifies any state enactment no matter what other alternatives are available and no matter how severely the measure in question trammels on other constitutionally protected interests—in this case robust interstate commerce.

For example, this Court has invalidated state application of its qualification requirement when it interfered with basic associational freedoms. *NAACP v. Alabama*, 377 U.S. 288 (1964); *NAACP v. Alabama*, 357 U.S. 449 (1958). As Justice Harlan noted, the registration requirements were designed to ensure that foreign corporations be amenable to suit in state courts so as to protect state citizens from fraud. 377 U.S. at 305. Nevertheless,

not all such regulation is benign when it has significant impacts on federal constitutional interests.

In *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970), the Supreme Court expressly stated that the existence of alternatives which promoted state interests with less impact on commerce were an important consideration under Commerce Clause analysis. To similar effect is *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951), in which the Court held that economic barriers could not stand even under the police power "if reasonable nondiscriminatory alternatives" were available.

By analogy, in *Dunn v. Blumstein*, 405 U.S. 330 (1972), this Court invalidated durational residency requirements for voting despite the claim by Tennessee that they helped combat voter fraud. As Justice Marshall indicated, protection against fraud "is a formidable sounding state interest." Nevertheless, despite the importance of this interest the state could not justify durational residency laws because "such sweeping laws" are not "necessary to prevent fraud." 405 U.S. at 345. That is, they were not the "least drastic means necessary for preventing fraud." 405 U.S. at 353. *Cf. M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) (an arm's-length negotiation by businessmen should be enforced by the courts "absent some compelling and countervailing reason.")

Similarly, as outlined in an earlier section, Mississippi can achieve its goal of making plaintiff subject to service of process pursuant to §5346 Miss. Code 1942 Ann., which authorizes service on the foreign corporation's agent who transacted business within the state. Or the state could obtain service under the provisions of its long-arm statute, §1437 Miss. Code 1942 Ann. These broader jurisdictional statutes are permissible in wake of developments subse-

quent to *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and, somewhat like registration requirements for voting, serve the function the penalty statutes once might have. And the federal court in Mississippi, *Cone Mills Corp. v. Hurdle*, 369 F. Supp. at 431, and Justice Harlan in *NAACP v. Alabama*, 377 U.S. 288, 305 both have recognized that protection against fraud by subjecting foreign corporations to suit locally is the primary goal of the qualification statutes.

In the present case, as a factual matter, defendant could have gained service on Allenberg by service on its agent living in Marks, Mississippi, under existing Mississippi law. Certainly the availability of that procedure negates the state's interest in protecting against overreaching foreign corporations in the current controversy and makes the potential harmful consequences on interstate commerce unjustifiable.

But even if, for the sake of argument only, one were to conclude that the qualification statute were justifiable, the state would have a burden to justify the failure to include a curative provision in its law as does the Model Business Corporation Act. Certainly that strikes a more equitable balance between the local interests in protecting against fraud and the national interests in interstate commerce. The draftsmen of the Model Act evidently were sensitive to the need to balance these competing values, but the state legislature chose not to give adequate weight to the Commerce Clause values. This was a choice reviewable by this Court, and was a choice that the legislature was not entitled to make in light of the deleterious effects on commerce. If there were a curative provision in the Mississippi law, then plaintiff would be able to maintain this action since it has now qualified to do business in Mississippi. While not conceding that even the qualification

requirement is the least intrusive means of assuring accountability by foreign corporations, *amicus* urges that the lack of a curative provision is at minimum a fatally defective flaw in the Mississippi statute. As a minimal recognition of the critical Commerce Clause values at stake, and of the potential for chilling a substantial amount of interstate commerce, the state is required by the Commerce Clause to allow a foreign corporation to maintain an action if it subsequently subjects itself to the jurisdiction of the state as Allenberg has done here. This gives effect to the basic interests in permitting access to the courts, *Boddie v. Connecticut*, 401 U.S. 371 (1971), in deterring self-help, *Mitchell v. W.T. Grant Co.*, 42 U.S.L.W. 4671, 4677 (U.S. May 13, 1974), in giving effect and certainty to interstate and international commercial transactions, *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and in subjecting foreign corporations to accountability to Mississippi residents.

When unpacked, defendant's legal argument can be seen for what it is—a high-sounding, but hollow, resort to principle to camouflage the thrust for immediate additional profit and windfall gain. The state's interest in protecting its citizens against overreaching foreign corporations is adequately met here, and so is defendant's interest in maintaining any action against Allenberg. The existence of these safeguards against fraud reveals the underlying foundation for defendant's claim—not prevention against fraud but legalized disobedience of concededly valid contractual agreements. This court should be especially unwilling to lend its support to such a nefarious scheme where the burden falls not only on interstate commerce but on interests outside the state. As Justice Stone recognized, such interests normally cannot protect themselves adequately through the internal political process of a state.

See *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 n. 2 (1945). For that reason, courts should give especial deference to such interests. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-54 n. 4 (1939). *Cf. Gordon v. Lance*, 403 U.S. 1 (1971). Such concern is warranted by the widespread reneging currently occurring on all too many forward cotton contracts.

CONCLUSION

There is no allegation of bad faith on the part of plaintiff, and the state's interests are amply protected by alternatives both actually and potentially available. In light of the nature of the regulation involved and its necessary direct impact on interstate commerce, and in light of the actual effect on such commerce, in light of the alternatives open to defendants and to the state to protect the legitimate local interests claimed, *amicus* urges that Appellant Allenberg be allowed to maintain this action on its concededly valid, freely bargained for contract.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-628

ALLENBERG COTTON CO.

Appellant

v.

BEN E. PITTMAN

Appellee

On Appeal from the
Supreme Court of the State of Mississippi

MOTION TO STRIKE

Pursuant to Rule 40(5),[1] Appellee moves the Court to strike all or certain portions of the brief filed by the American Cotton Shippers Association as *amicus curiae*.

BRIEF IN SUPPORT

I. STATEMENT

Aside from the question of jurisdiction[2] this case involves one substantive consideration: Whether the Allenberg Cotton Company was engaged in interstate commerce and therefore exempt from qualifying as a foreign corporation in the state of Missis-

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[1] "Briefs must be compact, logically arranged with proper headings, concise, and free from burdensome, irrelevant, and scandalous matter. Briefs not complying with this paragraph may be disregarded or striken by the court."

[2] "[F]urther consideration of the question of jurisdiction is postponed to the hearing of the case on the merits." 42 L.W. 3541 (March 26, 1974).

sippi.[3] Previous decisions[4] defining interstate commerce for purposes of exempting foreign corporations from no-access (to state court) statutes upon failure to register have *not once* spoken to the *motives* of parties availing themselves of the defense offered by such statutes as constitutionally significant. In addition, the record in the present case is *devoid of* evidence taken with respect to the reason Ben Pittman failed to deliver his crop to the Allenberg Cotton Company.

In consenting to participation by the American Cotton Shippers Association as a friend of the Court, counsel for Pittman expected a presentation limited to a discussion of fact and law specifically related to the question now pending. This motion contends that the brief filed contains irrelevant and scandalous matter with respect to Appellee and his counsel.

II. THE CHARGES

Ben Pittman has been acting pursuant to advice of counsel throughout this litigation. In addition to allegations of current attempts to enlist this Court's support in an "ignoble"[5] (motivated or characterized by baseness; low birth; of animals)[6] and "nefarious"[7] (heinously or impiously wicked; vicious)[8] scheme,[9] *amicus* points to false pretense and deceit (dissimulation)[10] and a *willingness to prostitute talents and/or be influenced improperly by bribery or corrupt measures* ("venality").[11] A second set of charges, which in and of themselves would be enough to evoke a defensive response by any member of this Bar, are weak in comparison, *i.e.*, "self aggrandizement,"[12] lack of

[3]And therefore not subject to statutory penalties. As posed by Appellant: "Can the Mississippi courts absolutely ignore controlling constitutional precedent, *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 882 (1921), and bar a foreign corporation from enforcing contracts for the purchase of raw agricultural products in Mississippi?" *Jurisdictional Statement* 3.

[4]*E.G., Eli Lilly & Co., Inc. v. Sav-on-Drugs*, 366 U.S. 276; *Union Brokerage Co. v. Jensen*, 322 U.S. 202; *Sioux Remedy Co. v. Cope*, 235 U.S. 197; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282.

[5]Brief, *American Cotton Shippers Association* 40. (hereinafter referred to as Brief.)

[6]WEBSTER, THIRD NEW INTERNATIONAL DICTIONARY 1125 (1971) (hereinafter referred to as WEBSTER.) OXFORD UNIVERSAL DICTIONARY 954 (1955).

[7]Brief at 99.

[8]WEBSTER at 1513.

[9]*Amicus* fails to set forth what or who is specifically involved. Participants could include the Mississippi Supreme Court, the state's legislature, and obviously Ben Pittman and counsel. Strictly construed they relate to Pittman and counsel.

[10]Brief at 40. WEBSTER at 657.

[11]Brief at 51. WEBSTER at 2539.

[12]Brief at 51.

"noble purpose",[13] and "insensitivity."[14] Falling into a separate line of attack are allegations by *amicus* apparently questioning both the right of Ben Pittman to defend himself in this Court and the propriety of his counsel asserting rights acquired by him under the Mississippi statute involved:

> Rather, [Ben Pittman] who intentionally seeks to trammel on the trust and fair-dealing (A-64) of Appellant, unabashedly requests this Court to ignore a four square precedent....Defendant, *who appears in this Court with the unclean hands of a contract breacher*, has the *effrontery* ["insolent to crass discourtesy"][15] *straight-facedly* to urge this Court to uphold his claim . . . .[16]

III. CASE PRECEDENT

The law with respect to including scandalous material in presentations before this Court is clear. In *Supreme Court of the Royal Arcanum v. Green*, 237 U.S. 531, 546 (1915):

> Before making the order of reversal, we regret that we must say something more. The printed argument for the defendant in error is so full of *vituperative, unwarranted, and impertinent expression as to opposing counsel* that we feel we cannot, having due regard to the respect we entertain for the profession, permit the brief to pass unrebuked or to remain in our files and thus preserve the evidence of the forgetfulness by one of the members of this bar of his obvious duty. Indeed, we should have noticed the matter at once....[T]he brief of the defendant in error is ordered to be striken. [Emphasis added.][17]

The posture of this Court with respect to duty of counsel is perceived by Stern and Gressman in the following warning:

> *Avoid personalities or scandalous matter.* It should be superfluous to add that any scandalous matter, *any personal attack on opposing counsel* or lower court judge, *or any imputation of improper conduct by counsel* or court has no place whatever in the brief....*When such matter*

[13]*Ibid.*

[14]*Id.* at 40.

[15]WEBSTER at 726.

[16]Brief at 40. (Emphasis added.) These are but primary examples. See also Brief at 10-12, 99.

[17]See also, *Wilkes County v. Coler*, 186 U.S. 480; *Yellow Poplar Lumber Co. v. Chapman*, 215 U.S. 601 (petitions and briefs striken); *Washington Post Co. v. Chaloner*, 250 U.S. 290 (brief striken); *Green v. Elbert*, 127 U.S. 615 (brief striken). Other cases are gathered in R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE, § 1311 (1969).

appears a motion to strike all or a portion of the offensive brief becomes appropriate. [R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 477 (1969). (Emphasis added.)]

IV. CONCLUSION

On the basis of precedent and the plain language of Rule 40(5), it is respectfully submitted that this Court cannot and should not tolerate a brief remaining in its files containing such baseless allegations relating to character, professional responsibility, and motives as characterized by *amicus*. The decision by the trade organization to proceed in this manner places Ben Pittman, his attorneys and this Court in the position of beneficiaries of emotionally charged, speculative, and unjustifiable assertions. None find solace from the record; none relate to constitutional criteria heretofore utilized to decide the question at hand. They must be striken.

This motion comes prior to this Court's summer recess. The case is scheduled for oral argument in the fall. Quite obviously *amicus* has compiled a great quantity of work for review by the Court and possesses an obvious interest. If the brief is judged to contain material capable of assisting in the decision-making process, Appellee consents to a refiling.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

NO. 73-628

ALLENBERG COTTON COMPANY, INC.,
Appellant,

vs.

BEN E. PITTMAN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

REPLY BRIEF OF APPELLANT

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I.

JURISDICTION

The only new point raised in the Appellee's Brief with regard to jurisdiction is the contention that Allenberg has "waived" its right to have this case considered because it has taken the position that the certificate issued by the Supreme Court

of Mississippi does not need to be physically signed by *all five* members of that Court. See Appellee's Brief, Page 48.

This is certainly a novel contention.

The previous Order of this Court was designed to allow Allenberg to obtain *another* certificate stating whether the judgment below rested on an "adequate and independent state ground." Allenberg declined to do this because it believed the original certificate was sufficient, and because it believed that no "adequate and independent state ground" could logically exist.

If it is the desire of this Court that all five members of the Mississippi Supreme Court sign the certificate, Allenberg will apply to that Court for the remaining four signatures. However, Allenberg respectfully suggests that such a procedure would be an undue affront to the integrity of Chief Justice Robert G. Gillespie and the Clerk of the Mississippi Supreme Court, both of whom have certified that the certificate was issued by the Mississippi Supreme Court.

II.

THE MOTION TO STRIKE

Counsel for Appellee have moved to strike all or certain portions of the Brief filed by Amicus. Although this motion is not addressed to Appellant's Brief, Appellant wishes to respond because of its strong feeling that nothing in Amicus' Brief is in any way improper.

The Amicus Brief was principally authored by James F. Blumstein, Associate Professor of Law at Vanderbilt University Law School, now a visiting Professor of Law at the Duke University Law School. Mr. Blumstein worked

under the guidance of Mr. Neal P. Gillen, General Counsel for the American Cotton Shippers Association. The Amicus Brief contains a serious and intelligent discussion of the principles of law under consideration in this case, *and of their underlying policies*.

This case concerns the enforcement of contractual promises which the Appellee does not deny having made. These promises were made within a commercial and constitutional system which has been established to preserve certain principles. The portions of the Amicus Brief to which Appellee objects deal directly with the heart of this dispute, and address, in concrete form, the question of the soundness of Appellee's position when viewed in the light of the ethical policies and principles which underlie the enforcement of contracts by society.

As Dean Pound has stated:

> "Wealth, in a commercial age, is made up largely of promises. An important part of everyone's substance consists of advantages which others have promised to provide for or to render to him; of demands to have the advantages promised which he may assert not against the world at large but against particular individuals. Thus the individual claims to have performance of advantageous promises secured to him. He claims the satisfaction of expectations created by promises and agreements. If this claim is not secured friction and waste obviously result, and unless some countervailing interest must come into account which would be sacrificed in the process, it would seem that the individual interest in promised advantages should be secured to the full extent of what has been assured to him by the deliberate promise of another. Let us put this in another way. In a former lecture I sug-

> gested, as a jural postulate of civilized society, that in such a society men must be able to assume that those with whom they deal in the general intercourse of the society will act in good faith, and as a corollary must be able to assume that those with whom they so deal will carry out their undertakings according to the expectations which the moral sentiment of the community attaches thereto. Hence, in a commercial and industrial society, a claim or want or demand of society that promises be kept and that undertakings be carried out in good faith, a social interest in the stability of promises as a social and economic institution, becomes of the first importance. This social interest in the security of transactions, as one might call it, requires that we secure the individual interest of the promisee, that is, his claim or demand to be assured in the expectation created, which has become part of his substance." [Pound, An Introduction to the Philosophy of Law, Yale University Press (1954) Pp. 133-34.]

Appellee has sought to justify his posture in this case by identifying his position with the interest of the State, i.e. with the larger interest of the government and society. Appellee has asserted that his action serves a desirable end as the action of a "private attorney general." But the Amicus Brief has challenged that posture, and has sought to point out that Appellee's legal position is in fundamental conflict with the basic interest of the State in recognizing that promises create value and that their enforcement is a necessity for maintaining value as a basis of civilization in a commercial age.

These ethical considerations are present in this case, not just in the abstract, but in a concrete and real manner. The validation of Pittman's repudiation of his contract by the Mississippi court in May, 1973, caused a shock wave

throughout the cotton industry. Counsel for the American Cotton Shippers Association, together with the cotton merchants, went through an agonizing and traumatic period between the decision in this case and the decision in *Cone Mills Corp. vs. Hurdle*, 369 F. Supp. 426 (N.D. Miss. 1974), on January 10, 1974. In Mississippi alone, where outright repudiation of forward contracts became most widespread, there were over one million bales of cotton (about one out of every twelve bales produced in the nation in 1973) under forward contract in 1973. Repudiations of these contracts were not the actions of "private attorneys general," but self-seeking actions of men undermining the very foundation of commercial intercourse in the federal free trade system which the Commerce Clause was intended to establish.

The Amicus Brief seeks to direct the Court's attention to these basic considerations. Surely there is nothing improper in doing so. Indeed, it would be improper to fail to point up the fundamental contradiction between the needs of society and the Appellee's position in this case.

For these reasons the Motion to Strike should be denied.

III.

CORRECTION OF CERTAIN OF APPELLEE'S INFERENCES ABOUT THE FACTS

Pittman argues that Allenberg has substantial contacts in the State of Mississippi which go beyond those necessary to conduct the business of buying and selling cotton in interstate commerce.

Specifically, what are Allenberg's contacts in the State of Mississippi?

Allenberg does not have an office in Mississippi, nor does it own a warehouse there. Allenberg has no employees working in Mississippi to solicit business. It has no employees in Mississippi at all. It has no bank accounts in Mississippi. It makes no sales of cotton in Mississippi. Contrary to the implications of Appellee's Brief at page 2, Allenberg does not pay for the cotton in Mississippi. Allenberg pays for the cotton at its bank in Memphis, Tennessee, the Union Planters National Bank of Memphis, when a draft is presented to that bank in Memphis with negotiable warehouse receipts attached. Such a draft could be presented to the bank by the farmer himself. However, in the instant case the local cotton broker (an independent broker acting for both parties)[1] explained that if Pittman had delivered, he (the broker) would have paid for the cotton himself, and then have prepared the draft on Allenberg's bank. Thereafter, the draft would have been presented through banking channels to Allenberg's bank in Memphis for payment. Allenberg does not loan the money to the broker for this purpose. No advance is made by Allenberg to the broker. Allenberg's payments are made in exchange for the delivery of the negotiable documents in Tennessee. Appendix, page A-60, A-68.

After the warehouse receipts are received in Memphis and paid for in Memphis, Allenberg becomes the owner of a negotiable document representing cotton in a Mississippi compress and warehouse for a period of time long enough to allow Allenberg to sort Pittman's cotton into

[1] The local cotton broker is an independent businessman living in Marks, Mississippi. He is not an employee of Allenberg's, or of Pittman's. He is paid a per bale commission for arranging the sale between the two parties. Sometimes the commission is paid by the farmer selling his cotton, sometimes by the buyer. Appendix, p. 53.

shipping lots (in the trade called "even-running lots" usually of 100 bales each) and issue shipping orders to the compress and warehouse instructing it to load particular bales from Pittman's crop and from other crops in groups of like grade and quality onto freight cars for shipment out of the State of Mississippi. Sorting and classification of cotton, and issuance of shipping orders, is done in Memphis (again contrary to the implications of Appellee's Brief at p. 10).

The compress warehouse performs three essential functions: (1) it issues negotiable warehouse receipts[2] pursuant to the United States Warehouse Act, 7 USC Sec. 241, et seq.; (2) it compresses the cotton into shipping bales; (3) it performs the mechanical function of loading the bales on freight cars in even-running lots for shipment out of Mississippi pursuant to the shipping instructions of the buyer.

It is not normally possible for cotton to be shipped from Mississippi until the loose gin flat bales have been compressed into shipping bales, and sorted. Except in rare cases, cotton from a particular farm is not all of the same grade and quality and cannot be shipped together to a particular mill. The buyer in Memphis must sort it by sample and group it with other cotton into even-running lots to meet the particular specifications of a given mill before it can instruct the warehouse to perform the mechanical function of removing the designated bale from the warehouse and placing it on a freight car. It is not economi-

[2] The cotton is purchased by the cotton merchant with up to 90% borrowed capital which is furnished by the merchant's bank using the negotiable warehouse receipt as collateral for the loan. See materials at **Statement of the Case**, p. 19. Thus the warehouse is also necessary to interstate commerce in cotton because its negotiable receipt forms the security for the loan of funds which makes the purchase possible.

cally feasible to ship a given cotton bale from the area where it was produced until it has been classified by the buyer to determine which mill's needs it may fill and where it is to be shipped. See materials of STATEMENT OF CASE, pages 9-12.

Thus Allenberg did nothing in Mississippi which was not absolutely essential to purchasing cotton for shipment in interstate commerce.[3] If its activities in Mississippi require qualification to do business there, the business of

---

[3] The minimum presence of Allenberg in the State of Mississippi immediately distinguishes the instant case from many of the decisions cited by Pittman.

In **Union Brokerage Co. vs. Jensen**, 322 U.S. 202 (1944), the company was required to qualify where the Court found that it had established a local office and local operations just like any local business. The company established a local operation "wholly outside of the arrangements it makes with importers or exporters." [322 U.S. 208] Union Brokerage Co. was required to qualify for that portion of its operations that were intrastate, and the Court made it clear that where a foreign corporation comes into the state to conclude an interstate transaction it would be free of the qualification requirement. The Court expressly cited with approval, **Dahnke-Walker**, **Sioux Remedy**, and **International Textbook**. [322 U.S. 211]

In **Federal Compress & Warehouse Company vs. McLean**, 291 U.S. 17(1934) the Court upheld a state license tax on **local** compress and warehouse companies graduated by the number of bales of cotton compressed per annum. The Court stated "...the burden of the tax upon the commerce is too indirect and remote to transgress constitutional limitations. [Citations omitted.] The case, therefore, stands on a different footing from those in which local regulation of the business of purchasing a commodity within and shipping it without the state have been deemed to impede or embarrass interstate commerce in those commodities. [Citing **Dahnke-Walker** and **Lemke**]." [291 U.S. at 22]. Contrary to the statement in Appellee's Brief at p. 3, Allenberg does not engage in the cotton warehousing business in Mississippi and there is nothing in the record even remotely hinting that it does.

For identical reasons **Independent Warehouses, Inc. vs. Scheele**, 331 U.S. 70 (1947), cited by Appellee's Brief at p. 13, is also inapplicable to this case. There a town in New Jersey was allowed to tax the local "business of storing goods for hire." [331 U.S. at 72].

(Continued on following page)

buying cotton cannot be carried on without local qualification in each state where cotton is purchased.[4] This result would, of course, be completely inconsistent with the principle that no state can require local qualification to allow access to local markets. That principle was recently reaffirmed by *every* member of the Supreme Court in *Eli Lilly and Co. vs. Sav-on-Drugs, Inc.*, 366 U.S. 278 (1961).

(Continued from preceding page)

The case of **Sunlight Produce Co. vs. State**, 183 Ark. 64, 35 S.W. 2d 342, relied upon by Appellee's Brief at p. 19, held that the business conducted was "partly" intrastate where the foreign corporation: had a salaried local manager-buyer; had a local office in a house in Arkansas rented for that purpose; paid for purchases of milk locally; and stored the goods purchased in the local house. In contrast, Allenberg had no local salaried manager-buyer, no local office, did not pay for the goods locally, and did not store them on its own local premises.

In the case of **In re Conecuh Pine Lumber & Mfg. Co.**, 180 F. 249 (M.D. Ala. 1910) an Alabama federal district court decision does appear to support Pittman's position. However, both the language and holding of that case are almost identical to the language and holding of the Kentucky Supreme Court opinion which was reversed in **Dahnke-Walker Milling Co. vs. Bondurant**, 257 U.S. 882 (1921). **Conecuh Pine Lumber** also conflicts with **Shafer vs. Farmers' Grain Co.**, 268 U.S. 189 (1925). **Dahnke-Walker**, of course, was decided eleven years after **Conecuh Pine Lumber**, and **Shafer** was decided fifteen years afterwards.

More recent decisions of the federal district courts in Alabama have held that purchasing cotton in Alabama through forward contracts is not an activity which requires qualification to do business in Alabama. See, for example, **Reigal Fiber Corp. vs. Ellis Brothers**, N.D. Ala. No. 73P-954 (1974). Federal district courts in Georgia have also held that cotton purchases like Allenberg's in this case do not constitute doing intrastate business. **R. N. Kelly Cotton Merchant, Inc. vs. York**, M.D. Ga., No. CA-861 (1974).

[4] This case gives rise to a question similar to that posed by Mr. Justice Bradley in **Robbins vs. Shelby County Taxing District**, 120 U.S. 489, 494 (1887). If Allenberg's purchases require local qualification, how is an out of state company to gain access to buy cotton in a market in another state—access supposedly guaranteed by the Commerce Clause without local qualification? If cotton buyers cannot conduct their purchases in the manner followed by Allenberg, they will be shut out from these markets unless they qualify in each state where purchases are made. See footnote 17, infra.

(Continued on following page)

A company which has done nothing in a State which is not essential to buying a commodity there and shipping it from the state is engaged in interstate commerce, and it should not be required to qualify locally in order to buy the commodity produced in that state and remove it from that state.

IV.

APPELLEE'S ADOPTION OF TAXING RULES AS QUALIFICATION RULES

In deciding what activities are of sufficient quantum or quality to require qualification by a foreign corporation in a given state, it is said that two methods of approach have been adopted: (1) "balancing"—weighing the competing interests of federal free trade policy against the interest of the state in requiring qualification and in prohibiting enforcement of contracts made without qualification; and (2) "mechanical"—comparing the facts of the instant case with the facts of prior decisions.

Mechanically, Pittman is unable to reconcile his position with previous qualification cases, and therefore he attempts to support it with tax cases. That effort is also unsuccessful (see footnotes 3 and 6). His "balancing" analysis is equally deficient.

In a "balancing" analysis, the Supreme Court has investigated "whether the state's interest in the particular type of statute and in the activities in question is actually great enough to justify the imposition on the foreign corporation of the specific burdens involved." Note, *Corporate Registration: A Functional Analysis of Doing Business*, 71 Yale L.J. 575 (1962); *Southern Pacific Co. vs. Arizona*, 325 U.S. 761 (1945).[5]

(Continued from preceding page)

Pittman has pointed out that after the decision in this case, Allenberg qualified to do business in states where it buys cotton. **Motion to Dismiss or Affirm**, pp. B-1 – B-12. Allenberg took this step because, under the decision below, access to markets to buy cotton was foreclosed without qualification.

What are the interests of the State of Mississippi in requiring qualification as a condition precedent to making contracts to purchase cotton there? Originally, corporate qualification statutes were intended to assure that local residents could sue foreign corporations in local courts. In the 19th Century, when most of the states first enacted qualification statutes, long arm statutes were not widespread, and assertions of jurisdiction over companies not physically present in the states was a difficult process. In the climate of that age the quali-

[5] The **Restatement, Second, Conflict of Laws** §311, adopts a balancing analysis in determining the degree of activity which may be conducted in a state without local qualification under a typical "doing business" statute. But the Restatement declines to define "interstate commerce," or to discuss what may constitute an "undue burden" on interstate commerce. [§311, comment d.] The balancing analysis suggested by Pittman lists four "benefits" Allenberg has allegedly "received from the state": 1) access to the state's major agricultural commodity; 2) using facilities in the state to compress and classify cotton; 3) use of warehousing facilities; 4) protection of cotton by police and fire departments while warehoused. Brief of Appellee, p. 43.

"Benefit" (1) is afforded to Allenberg by the Commerce Clause, not the State of Mississippi. With regard to "benefit" (2), Allenberg classifies cotton in its Memphis office not in Mississippi. The remaining benefits merely amount to the fact that for a period of time between delivery of documents in Tennessee and issuance of specific shipping orders from Tennessee, the cotton is located in the compress and warehouse where it was placed by the farmer. As pointed out above, this is essential to interstate commerce in cotton.

Presumably the local warehouse company pays real property and privilege taxes in connection with the warehouse facility and business, benefit (3); and pays state and local taxes for fire and police protection, benefit (4); and these payments are reflected in the warehouse charges. The warehouse assumes the risk of loss of the cotton for which it has issued a receipt (United States Warehouse Act, 7 U.S.C. §262), and thus the warehouse, not Allenberg, is the recipient of benefits (3) and (4).

fication statutes were justified by the need to assure local residents that foreign corporations could be sued locally. However, the decisions of the U. S. Supreme Court have now made it possible to obtain jurisdiction over foreign corporations in local courts without the aid of the qualification statutes. ***International Shoe Co. vs. Washington***, 326 U.S. 310 (1945). Long arm statutes are now in effect in every state, and local residents can obtain jurisdiction to sue a foreign corporation in connection with business done in the state whether that business is qualified or not. ***International Harvester Co. vs. Kentucky***, 234 U.S. 579 (1914).

Pittman has recognized that the original justification of the qualification requirement is no longer valid, and he does not place heavy reliance on it. Pittman advances only one real reason as a justification for the Mississippi type law: the state interest in taxation. According to Pittman, the primary purpose of the qualification requirement is to solicit information (Brief of Appellee, page 33), which is in turn useful to the State of Mississippi in imposing its taxes. Brief of Appellee, pages 25-28. Consistent with his attempt to justify qualification requirements by the state taxing interest, Pittman argues in favor of a merger of the constitutional rules concerning jurisdiction to tax and jurisdiction to impose qualification requirements.

This argument is the subject of this portion of Appellant's Reply Brief.

Much of Pittman's Brief is devoted to the argument that this Court should adopt the case law rules (as interpreted by Pittman) concerned with state power to impose ad valorem personal property taxes as an appropriate body of law from which to borrow rules regarding state

power to require qualification of foreign corporations.

Pittman asks the Court to adopt his reformulation of the principles of ***Coe vs. Errol***, 116 U.S. 517, and ***Kosydar vs. National Cash Register Company***, 42 L.W. 4767 (1974), as a test of the state's power to require qualification. Brief of Appellee, page 15.[6] Citing these tax cases, Appellee asks the Court to adopt a rule requiring actual movement of the goods purchased prior to or contemporaneous with passage of title to the buyer, as a test of the state's power to require qualification. Brief of Appellee, pages 10-15. Although it requires reworking of the ad valorem tax cases to state a qualification test from them, presumably what Appellee suggests is that an out of state corporation making an executory contract to purchase goods must qualify in the state of origin of the goods in every case where title to the goods purchased is to pass to the buyer before the goods are shipped. But is this a desirable standard for the imposition of qualification requirements? Allenberg believes that examination of this proposal will show that it is not.

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[6] Pittman also relies heavily on **Chassinol vs. Greenwood**, 291 U.S. 584 (1934). **Chassinol** is not only distinguishable from Pittman's position, it supports Allenberg. In that case the Court held that the City of Greenwood, Mississippi could impose a license tax on cotton buyers who were local residents of the city. In that opinion the court stated that the sale of cotton by a local farmer to a local buyer is not in interstate commerce. [291 U.S. at 587]. The court then specifically pointed out that a sale to a buyer outside the State of Mississippi would be a sale in interstate commerce. [291 U.S. at 587]. Contrary to the statement in Appellee's Brief at page 3, **Chassinol** does not hold that Allenberg's cotton buying in Mississippi is taxable. As pointed out above, **Chassinol** expressly recognizes that an **out of state** purchaser buying cotton from a local seller makes a purchase in interstate commerce.

Similarly, **Parker vs. Brown**, 317 U.S. 341 (1945), merely found that a sale by a local seller to a local buyer was intrastate commerce; and does not support Pittman.

First, such a test would mean that a foreign corporate buyer must qualify in every case where an executory contract is made to purchase goods under which there will not be contemporaneous shipment at the time of the delivery to the buyer. As a practical matter Pittman's proposed rule would require every corporation in the nation which makes contracts to purchase goods which are warehoused by the *seller* and shipped after title has passed to the buyer, to qualify in every state where the goods are purchased. Thus a large part of the agricultural merchandising industry, if not all of it, would be required to qualify to do business in every state where purchases are made; and every business which buys goods on presentation of negotiable storage documents would have to qualify in each state in which purchased goods are warehoused.

Secondly, such a test would irrationally distinguish in constitutional effect between purchases of goods which are capable of being shipped contemporaneously with passage of title to the buyer, and purchases of goods over which the buyer must assume control before shipping destinations can be ascertained. In the latter category are purchases of goods for resale, and purchases of goods for which negotiable storage documents are issued, which are shipped pursuant to the purchaser's instructions after purchase. Warehousing of farm goods is a federally regulated function (under the United States Warehouse Act, 7 USC Sec. 241 et seq.) because Congress has recognized that trade in interstate commerce in those goods will be facilitated by the free exchange of negotiable warehouse receipts. The rule proposed by Appellee would mean that any buyer of otherwise negotiable storage documents for corn, tobacco, flaxseed, wool, wheat, soybeans, etc., would have to refuse tender of receipts for goods stored in states where it was not qualified to do business, i.e., it would make the receipts not freely negotiable.

Pittman's rule also is inconsistent with the previous decision of *Shafer vs. Farmers' Grain Co.*, 268 U.S. 187 (1925) where the buyer purchased wheat and took delivery at grain elevators in North Dakota for subsequent shipment by the buyer to its out of state customers. In *Shafer* this Court held that such purchases were made in interstate commerce, and that the state of North Dakota could not require local licenses as a condition precedent to engaging in that activity, although shipment occurred after passage of title to the buyer.

Pittman acknowledged that modification of *Shafer* is necessary to support his position (Brief of Appellee, p. 21). But such re-examination is inappropriate in the light of congressional language in federal statutes and legislative findings of the scope of interstate commerce in the cotton industry. Commodity Exchange Act, 7 USC Sec. 3; Cotton Research and Promotion Act, 7 USC Sec. 2101. There is no way to reconcile the holding, much less the language, of *Shafer* with the standard proposed by Pittman. Indeed the analysis of course of dealing in *Shafer* and *Lemke vs. Farmers' Grain Co.*, 258 U.S. 50 (1922) is peculiarly applicable in this case where virtually all cotton produced in Mississippi is shipped out of the state.

Adoption of Pittman's proposal would clearly be forging new doctrine. There is no way to square that result with *Flood vs. Kuhn*, 407 U.S. 258 (1972). The new doctrine proposed by Pittman would affect existing contracts made on the basis of current understanding of the law, without prior warning to innocent parties, and thus, under *Flood* is an appropriate matter for Congress to address by the exercise of its power to redefine the scope of the commerce clause. *State Board of Insurance vs. Todd Shipyards*, 370 U.S. 451 (1962); *Prudential Insurance Co. vs. Benjamin*, 328 U.S. 408 (1946).

Appellee's proposed new formula would replace settled law with new and difficult legal questions of qualification turning on the wording of contracts, contemplation of the parties, and time of title passage rather than actual movement of the goods in interstate commerce. In *Kosydar vs. National Cash Register Co.*, 42 L.W. 4767 (1974), the Court emphasized the need for a concrete and simple standard from which businessmen and state officials could easily determine the time at which goods became immune from ad valorem taxation by reason of the export clause. In *Kosydar* the Court reaffirmed the long established rule of *Coe vs. Errol*, 116 U.S. 517 (1886), that goods do not become immune until they *actually* begin to move. Appellee's proposed rule for qualification, ostensibly derived from *Coe vs. Errol* and *Kosydar*, flounders on the need for a simple and direct standard.

Present law, under *Dahnke*, *Shafer*, and *Lemke*, adheres to the *actual* movement test. Existing law under these precedents holds that state qualification and licensing requirements are not requisite for the making of contracts to purchase goods which *actually* are to be shipped in interstate commerce. Under existing law this rule obtains regardless of fine legal distinctions regarding time of passage of title. Thus the purchases in *Shafer* and *Lemke*, where delivery was made at grain warehouses in state for interstate shipment by the buyer thereafter, and the purchases in *Dahnke*, where deliveries were made FOB carrier, were equally exempt from local licensing and qualification requirements.[7] In turning on

[7] Fletcher, **Cyclopedia Corporations** §8415, pp. 374-5, cited at page 18 of Appellee's Brief in apparent support of Appellee's position, actually supports Allenberg. Fletcher states: "The purchase of goods by a foreign corporation for shipment to another state constitutes interstate commerce [here footnoting **Shafer vs. Farmers' Grain Co.**, 268 U.S. 189] and the commerce includes the purchase quite as much as it does the transporta-

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actual movement, existing qualification law is wholly consistent with *Coe vs. Erroll* (and, of course, in the many years that *Coe vs. Erroll* and *Dahnke* have been on the books there has never been a suggestion that they are not consistent).

Appellee, however, introduces a new and cumbersome concept. Appellee proposes that despite the fact that the goods actually are purchased for shipment out of state, the local qualification requirement should be imposed on out of state purchasers who take title to the goods before shipment begins. A businessman, or a state official, applying such a rule must ignore the *actual* shipment of the goods in interstate commerce by the buyer, and examine the terms of each contract of purchase to determine whether time of title passage is before or after the shipment.

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tion [here footnoting **Dahnke-Walker Milling Co. vs. Bondurant**, 257 U.S. 282]." Pittman quotes this same sentence at Appellee's Brief, P. 18, but omits the citation to **Shafer**, and claims that the quotation supports his argument (that title passage must come at the time of or after shipment). It is evident that in citing **Shafer**, Fletcher does not support Pittman's argument and does not "distinguish **Dahnke**" on the basis claimed in Appellee's Brief at p. 18.

The case of **Superior Oil Co. vs. Mississippi**, 280 U.S. 390 (1929), contrary to Appellee's Brief at pp. 16-17, does not turn on the storage of the oil. In that case Mississippi levied at 3¢ per gallon tax on a local corporation selling oil to a local fish packing business. The fish packer then resold the oil to shrimp fishermen at Biloxi, Mississippi, who used the oil to fish in fishing grounds off the Louisiana coast. The court found the seller's connection with the fishermen's use of the oil too remote to make the sale a transaction in interstate commerce, and stated: "...it seems to us that the connection of the seller with the steps taken by the buyer after the sale was too remote to save the seller from the tax." [280 U.S. at 396].

In **Superior Oil** the purchaser did not remove the oil but resold to another purchaser who did. In contrast, Allenberg purchased the cotton, and Allenberg (not its customer) removed the cotton from the state.

Furthermore, Pittman's proposed rule rests on an interpretation of only two ad valorem tax cases having to do with the taxation of goods in the hands of the *seller* (*Kosydar*) or having no sale involved at all (*Coe v. Errol*). Other ad valorem tax cases which are more in point because they address the *buyer's* situation, indicate reason to doubt that Allenberg's cotton would be subject to ad valorem taxation in Mississippi during temporary storage after purchase by Allenberg. Hence, even under the proposed standard, Allenberg would not be required to qualify to do business in Mississippi. *Carson Petroleum Company vs. Vial*, 279 U.S. 95 (1929)(ad valorem tax may not be imposed on property temporarily stored in state by foreign buyer pending resale by buyer and delivery on ships).

There is another fundamental flaw in Pittman's argument. Pittman asks the Court to decide whether Allenberg should be required to qualify in Mississippi by applying his interpretation of the rules applicable to ad valorem taxation in *Coe vs. Errol* and *Kosydar*. This argument stems from Pittman's attempt to justify the Mississippi qualification requirement by the interest of Mississippi in taxing cotton belonging to Allenberg while it was in the compress and warehouse. But Mississippi does not tax such cotton, nor does it impose a net income tax on an out of state merchant buying cotton in Mississippi for resale outside of the state. Mississippi Code 1972 Annotated §§27-7-23 (quoted at Page 26, infra), 27-31-1 (quoted below).

Pittman actually argues that the state's interest in requiring qualification in this case is justified by the *possibility* that a Mississippi law *might* impose an ad valorem tax on the cotton in the compress and warehouse while Allenberg had title to it.

Mississippi does not impose an ad valorem tax on the cotton in Allenberg's hands. Mississippi expressly exempts from ad valorem taxation all cotton in Mississippi for five years after harvest.

Mississippi Code 1972 Annotated Sec. 27-31-1 provides:

> "*The following shall be exempt from taxation*: ....
> (i) all farm products grown in this state for a period of two years after they are harvested, when in the possession of or the title to which is in the producer, except the tax of one-fifth of one cent per pound on lint cotton now levied by the Board of Commissioners of the Mississippi Levee District; and *lint cotton for five years*, and cottonseed, soybeans, oats, rice and wheat for one year *regardless of ownership*." (emphasis added)

In order to accept Pittman's justification of qualification by the state interest in taxation in this case, this Court would need to render an opinion based upon a non-existent Mississippi taxing statute which hypothetically would impose an ad valorem tax on property belonging to foreign corporations even though the property was paid for upon delivery of negotiable documents out of state and even though it was shipped out of state as soon after delivery as the goods could be classified into shipping lots. This Court would not only have to assume the existence of such an imaginary taxing statute, it would then be required to assume its constitutionality. In effect the Court would be required to issue an advisory opinion on the constitutionality of a non-existent state ad valorem tax.

If this Court wished to merge the rules regarding state power to impose ad valorem taxation and state power to require qualification, a sounder approach would be to wait until the Court is presented with a case in which a state

actually asserted an ad valorem tax. The question whether a state could design a taxing statute constitutionally to reach the cotton temporarily stored in Mississippi after title passes to a foreign buyer but before it leaves the state, is a question for another case, and is not properly before the Court on this record.

Such an inquiry is not appropriate in this case where the state has chosen not to impose an ad valorem tax. Whether Mississippi might impose such a tax is not the proper criterion for deciding whether or not it can require qualification. The proper criterion for deciding this case is to examine the nature and importance of the *actual* interest of the state in requiring qualification, and balance it against the interests of the federal free trade policy.

Pittman's argument would extend qualification jurisdiction beyond the exercise of the state's taxing jurisdiction, in conflict with current understanding of the law, and heedless of the effect of judicial change in the law on existing contracts. Cf. *Flood vs. Kuhn*, 407 U.S. 258 (1972). It also ignores considerations of market access which have distinguished this Court's analysis of qualification cases from its analysis of tax cases (discussed infra).

In an alternative argument Pittman suggests another far reaching change in the constitutional law of qualification, Pittman points out that the states are now allowed to impose net income taxes on interstate businesses. *Northwestern States Portland Cement Co. vs. Minnesota*, 358 U.S. 450 (1959). Brief of Appellee, page 40. He then suggests that limitations on state power to impose qualification requirements have "outlived their usefulness", and proposes that the Court do away with such limitations. Brief of Appellee, page 41.

Pittman argues that since the states can tax interstate businesses, they should be allowed to impose qualification requirements upon interstate business, and that the two standards should be merged.

But the predicate of this argument is false. The *unqualified* assertion that the states can tax interstate businesses is not correct. There are limitations on the power of the states to impose taxes on interstate business. These limitations are constitutional rules designed by this Court on a case by case basis when dealing with actual assertions of state taxing power. The limitations are different for each type of state tax: net income taxes, *Northwestern States Portland Cement Co. vs. Minnesota*, 358 U.S. 450 (1959); ad valorem personal property taxes, *Kosydar vs. National Cash Register Company*, 42 L.W. 4767 (1974); gross receipts taxes, *Sonneborn Bros. vs. Cureton*, 262 U.S. 506 (1923); franchise taxes, *Spector Motor Service vs. O'Connor*, 340 U.S. 602 (1951); sales taxes, *McLeod vs. J. E. Dilworth Co.*, 322 U.S. 327 (1944); use taxes, *General Trading Co. vs. State Tax Commission*, 322 U.S. 335 (1944); etc. These varying rules are not adaptable for use as qualification standards.

Appellee has assumed that merging the rules with regard to jurisdiction to tax with the rules with regard to jurisdiction to require qualification would avoid questions of where to draw the line. However, this assumption is not based on reality. A line would still have to be drawn at some point.[8] In the area of state taxation, on a case

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[8] Of course, no line would have to be drawn if the Court held that all interstate business must qualify in every state where any activity is conducted, however minimal. Allenberg does not believe

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by case basis, the Supreme Court has balanced the states' interests against federal free trade policy in determining the validity of imposing different types of state taxes on interstate businesses. In similar manner, the Court cannot avoid balancing the competing interests of the states and federal free trade policy in determining when state requirements for qualification may be imposed on interstate business.

The beginning point for Pittman's argument is the statement that "the majority and dissent in *Lilly* agree that defining intrastate commerce for purposes of qualification requires the utilization of licensing and privilege tax decisions." Brief of Appellee, pages 10-11. From that point Pittman leaps to the conclusion that taxation and qualification may be equated. Brief of Appellee, p. 15.

Pittman fails to realize that it is a far different thing to merge the rules regarding qualification with the rules regarding privilege and license taxes, than it is to merge the rules of qualification with the rules regarding jurisdiction to impose other types of taxes, such as net income. *Northwestern States Portland Cement Co. vs. Minnesota*, 358 U.S. 450.

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the Court would seriously consider such an idea, since, under a balancing analysis, in going beyond the states' taxing interest, the qualification requirement would be extended to the point where the states' interest would be so small that the Court would not tolerate even a minimal burden on interstate commerce.

Qualification requirements are anything but minimal burdens (even ignoring the burdensome "no-cure" penalty discussed infra). Administrative costs of filing corporate qualification papers, and refiling each year, are similar to the administrative costs of filing local tax returns. The administrative costs to interstate businesses of filing tax returns have been recognized as even more burdensome, in many cases, than the cost of paying state taxes on interstate business. House Comm. on the Judiciary, Special Subcomm. on State Taxation of Interstate Commerce, H.R. Rep. No. 1480, 88th Cong. 2d Sess., vol. 1, at 598 (1964).

Eli Lilly refused to accept the *Northwestern States Portland Cement* rationale in a qualification case, and expressly reaffirmed the doctrine of absolute immunity from qualification for interstate transactions [366 U.S. 279]. Mr. Justice Harlan, concurring, was especially concerned about the market foreclosure effect of the qualification requirement [366 U.S. 286]. This feature distinguishes qualification and license taxes (where the concern is market foreclosure) from revenue producing taxation (where the concern is fairness to interstate commerce).[9]

While the state has a legitimate interest in securing tax revenues, it does not (contrary to Appellee's Brief p. 43) have the authority to grant or deny access to Mississippi's major agricultural commodity. Access is guaranteed by the Commerce Clause, and the Court reaffirmed that unequivocally in *Eli Lilly*. The state cannot exercise a power it does not have to grant or deny access to its markets through a qualification requirement, as a device to implement its taxing power. Alternative means of effecting its tax assessments and collections must be used by the state which do not impede market access.

An example of the considerations distinguishing qualification cases from ad valorem tax cases is shown by the differing treatment the *Kosydar* situation requires when qualification is considered. The comparable situation in

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[9] Reading **Eli Lilly** this way shows that there is no "inexplicable conflict" (Appellee's Brief, p. 43) between **Scripto, Inc. vs. Carson**, 362 U.S. 207 and **Eli Lilly. Scripto** followed **Northwestern States** in a use tax situation, holding that sales through an independent contractor do not relieve the vendor of his duty to collect a state use tax. But **Eli Lilly** refused to follow **Northwestern States** in a qualification case because of a concern for access to local markets in that case which was not present in Scripto.

Kosydar would be the following: the foreign corporate buyer contracts with National Cash Register (NCR) to buy the machines which were held to be taxable in *Kosydar*. The price of the machines goes up before time for delivery to the buyer and NCR refuses to perform claiming that the buyer should have qualified to do business in Ohio (where the machines were to be produced and delivered). Under Pittman's proposal, this would be a valid defense, even though the buyer would have shipped the machines out of state after delivery. Under Pittman's proposal, buyers would be careful not to make contracts to purchase from NCR or other Ohio sellers unless they had previously qualified in Ohio. Buyers only potentially or slightly interested in the Ohio market would not qualify there or make purchases there.

Pittman's argument that businesses engaged in interstate commerce may be required to qualify wherever they may be subject to net income taxation also conflicts with the Mississippi statute which expressly exempts foreign corporations from qualification requirements if they are "transacting any business in interstate commerce." Mississippi Code (1972) § 79-3-211(e). (Note that in arguing that this Court can interpret the state interstate commerce exemption out-of existence, Pittman must abandon his posture that interpretation of this exemption is purely a matter of state law (see Appellee's Brief, pp. 47-8), and admit that the exemption is an example of federal law incorporated by reference in the state statute, as argued by Allenberg. Appellant's Brief, pp. 52-59.)

But even if these problems are ignored, and it is assumed that merger of tax and qualification rules is desirable and achievable, the Court is asked by Pittman

to take the additional step of holding that all interstate businesses must qualify in every state in which they *might* be subject to a net income tax—even if they are not actually subject to such a tax (as Allenberg is not in Mississippi). After taking this step, the Court would then be required to determine whether, on the facts of this case, the State of Mississippi might constitutionally be allowed to impose a net income tax on Allenberg Cotton Company, Inc. The Court would have to consider every possible type of tax apportionment formulae which the State of Mississippi hypothetically might legislate. This of course, would lead the Court into an ethereal realm of rampant speculation, in which the members of the Court would be required to design imaginary taxing statutes for the State of Mississippi. Again, the Court would be called upon to render an advisory opinion on hypothetical legislation.

The states have met with much less success in imposing taxes on interstate *buyers* of goods than on sellers. Previous cases involving buyers give rise to substantial doubt that Mississippi could impose a net income tax or other tax on Allenberg merely because of its purchases. *Michigan - Wisconsin Pipe Line Co. vs. Calvert*, 347 U.S. 157 (1954); cf. *Richfield Oil Corp. vs. State Board of Equalization*, 329 U.S. 69 (1946).

If the Court were to hold that a given state may impose qualification requirements on all foreign corporations upon which it *might* constitutionally impose a net income tax even though the state does not actually do so, the burden of legal and administrative costs of compliance by interstate businesses would be overwhelmingly out of proportion to the benefit to the states. It is difficult and expensive for interstate businesses to determine whether

they are liable for taxes even when considering actual state taxing statutes.[10] To be required to determine liability for qualification on the basis of hypothetical tax laws would be still more onerous. Yet this burden would not produce any additional state tax revenues.

The State of Mississippi's power to tax foreign corporations is probably greatest when it imposes net income taxes. ***Northwestern States Portland Cement Co. vs. Minnesota***, 358 U.S. 450 (1959).

Mississippi expressly exempts from taxation, income derived from the purchase of cotton in Mississippi and sale elsewhere. Mississippi Code 1972 Annotated Section 27-7-23 provides, in defining net income of foreign and domestic taxpayers:

> "(3) ***Gains, profits, and income derived from the purchase of personal property within and its sale without the state***, or from the purchase of property without and its sale within the state, ***shall be treated as derived entirely from the state in which sold.***" (emphasis added)

If the application of the Mississippi qualification requirement in this case is justified by Mississippi's potential

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10 "For large corporations with well-staffed accounting and legal departments, the added costs [of compliance with state tax filing requirements in multiple states] may be tolerable. But for small manufacturers and wholesalers who by their sales incur tax liability all over the country, the accounting burden of complying with many tax statutes may be heavy; occasionally such costs oblige a small business to narrow the scope of its interstate operations. Merely the legal expenses of analyzing its interstate tax liabilities may be prohibitive. Perhaps the thorniest problem for small businesses arises from the Supreme Court's increasingly liberal definition of 'nexus' sufficient to constitute a tax situs in a state." Note, **Developments in the Law, Federal Limitations on State Taxation of Interstate Business**, 75 Harv. L. Rev. 953, 973-74 (1962). For similar commentary see House Comm. on the Judiciary, Special Subcomm. on State Taxation of Interstate Commerce, H.R. Rep. No. 1480, 88th Cong. 2d Sess., vol. 2, at 594-95 (1964).

interest in taxing Allenberg's activities, the qualification requirement will have been extended beyond the actual exercise of state taxing power. This result would be in conflict with current understanding of the law,[11] and it would ignore the market foreclosing effect of qualification requirements (which are even more serious when coupled with a "no-cure" statute like that of Mississippi).

Such a hypothetical or speculative state interest does not justify the real burdens imposed on interstate commerce by the decision below.[12]

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11 In a case where the state's only interest of substance is in acquiring information in connection with its taxing power, extending qualification requirements beyond the point to which the state has actually extended its taxing power, gives rise to the same problems discussed in footnote 8, supra.

It is clear that under current understanding of the law more activity within a state is required to enable the state to impose qualification requirements than that which would enable a state to impose taxes (or to exercise jurisdiction). "It is generally thought that a 'higher degree' of doing business in a state is necessary to subject a corporation to a licensing statute than is necessary in the case of a taxing statute." Comment, **Licensing of Businesses Engaged in Interstate Commerce**, 75 Harv. L. Rev. 138, 139 (1961); Issacs, **An Analysis of Doing Business**, 25 Colum. L. Rev. 1018, 1024-25 (1925); **Restatement, Second, Conflict of Laws**, §311, comment f. Since a change in the law would be required by Appellee's position, and such a change would affect existing commercial relationships established on the basis of current law, **Flood vs. Kuhn**, 407 U.S. 258 (1972), would mandate Congressional change of the law, if any change were thought desirable.

12 Of course, it is wholly circular to attempt to justify imposing Mississippi's qualification requirement on a business engaged solely in interstate commerce in Mississippi, on the ground that Mississippi has an interest in imposing a franchise or privilege tax on the interstate business in connection with those activities (as Pittman argues at page 27 of Appellee's Brief). A state franchise tax, even if fairly apportioned, may not be imposed on the privilege of doing business within the state if that business is interstate commerce. **Spector Motor Service vs. O'Connor**, 340 U.S. 602 (1951). If the activity in the state is interstate commerce neither a franchise tax, nor a qualification requirement, can be imposed. Spector; **Eli Lilly**.

V.

THE RELEVANCE OF FEDERAL LEGISLATION

Appellee argues that this Court should ignore Congressional legislation and policies in the agricultural sector unless there is a question of pre-emption of state law by federal statute. Brief of Appellee, page 20. This argument would come as a surprise to authors of previous opinions of this Court in which the application of state law has been challenged on Commerce Clause grounds. See for example, *Parker vs. Brown*, 317 U.S. 341, 363-368 (1945); and *H. P. Hood and Sons, Inc. vs. DuMond*, 336 U.S. 525, 544-5 (1949). The Commerce Clause is an affirmative grant of power to Congress and Congressional action is always relevant to its interpretation. It has long been recognized that "Congress has undoubted power to redefine the distribution of power over interstate commerce." . . . *Southern Pacific Co. vs. Arizona*, 325 U.S. 761, 769 (1945).

In *Parker vs. Brown*, the Court conducted an exhaustive review of Congressional agricultural laws and Department of Agriculture regulations, in determining whether there was a conflict between state law and the policies of the Commerce Clause. The Court stated in that case: "It is significant of the relation of the local interest in maintaining this [state marketing] program to the national interest in interstate commerce, that throughout the period from 1929 until the adoption of the prorate program for the 1940 raisin crop, the national government has contributed to these efforts by its establishment of marketing programs pursuant to Act of Congress or by aiding programs sponsored by the state." [317 U.S. 341, 364-5].

In the instant case, Allenberg has pointed out that Congress has created an extensive legislative framework

under which the agricultural production of the nation in general, and cotton in particular, is produced and marketed.

Specifically, since 1971 Congress has implemented fundamental changes in the farm allotment and price support system. These changes depend upon the continued viability of the practice of forward contracting to purchase cotton. Under present law no subsidy is paid cotton farmers so long as the market price of cotton stays above a target price set by the Department of Agriculture. Current legislation now allows the planting of cotton on acreage not covered by Department of Agriculture allotments, and there is no national price support protection for this cotton. The current farm program assumes that cotton farmers will be able to obtain operating capital, formerly available from government loans, from private sources by using forward contracts as collateral. The current farm program also assumes that cotton farmers will be able to protect themselves from price declines for cotton planted on non-allotment acreage by entering into forward contracts prior to planting. After implementing these changes the Department of Agriculture has publicly urged farmers to increase their use of forward contracts. See materials at Statement of the Case, page 25.

It would be ironic for this Court to accede to Appellee's contention that it should ignore these Congressional actions as irrelevant to the Commerce Clause analysis of the competing interests of the State of Mississippi and the needs of the national agricultural commodities market. An even greater irony would result if this Court, in the name of interpretation of the Commerce Clause, should uphold state requirements of qualification and state penalties which deprive forward contracts of economic validity if made without local qualification. Such a holding would deal a severe blow to the use of the forward contract in

the agricultural sector at the very time when national agricultural policy had been revamped to depend upon the forward contract as a substitute for government price supports and government loans of operating capital.

Moreover, the national government has long been extensively involved in maintenance and supervision of the national commodities markets, pursuant to the Commodity Exchange Act, 7 U.S.C. Sec. 1 et seq. The central economic function performed by the national futures markets is to establish a legal and economic climate in which merchandisers of agricultural goods can hedge their sales and purchases. This system allows merchants, such as Allenberg Cotton Company, Inc., to protect themselves against adverse price changes in the value of commodities, such as cotton, purchased by them for resale. In such a climate the merchant can pay the farmer more, and resell the cotton for less, than would be possible without hedging. See materials at Statement of the Case, pages 13, 19, 29. Hedging is the practice of offsetting purchases by sales, or vice versa. The Commodity Exchange Act makes it illegal to enter into other than bona fide transactions in interstate commerce in cotton. 7 U.S.C. Sec. 7c.

This national commodities merchandising system recognizes that entering into a contract to buy cotton, such as that between Allenberg and Pittman, is a transaction which itself has economic importance in the interstate commodities market. Yet the Supreme Court of Mississippi in this case has effectually required that before entering into such contracts the cotton merchant must have qualified to do business in Mississippi, and as a penalty for having failed to do so, these contracts have been deprived of economic validity by Mississippi's refusal to allow them to be enforced in its courts. This result is

completely inconsistent with the national commodities marketing system, which presupposes that both sides of the hedge—the purchase contract with the farmer, and the sale contract on the New York Cotton Exchange—will be of unquestioned legal and economic validity.

Surely these considerations cannot be ignored by this Court in interpreting the Commerce Clause.

VI.

THE "NO-CURE" MISSISSIPPI STATUTE

Appellee, in addition to asking the Court to hold that Allenberg should have qualified to do business in Mississippi, also asks the Court to validate the "no-cure" Mississippi statute as a constitutionally approved punishment for failure to qualify.

In practical economic effect, the most important aspect of this case is the fact that under Mississippi law if Allenberg Cotton Company, Inc., and the other cotton companies with existing forward contracts in Mississippi in 1973 were not qualified at the critical time,[13] they are forever absolutely barred from enforcing their contractual rights in state or federal courts in Mississippi, even if they should subsequently qualify to do business in Mississippi. Opinion of Mississippi Supreme Court, Jurisdictional Statement, page A-6; Mississippi Code Annotated (1942), Sec. 5309-239; *Parker vs. Lin-Co Producing Co.*, 197 S.2d 228 (Miss. 1967).

This key aspect of the instant case is the subject of very little direct discussion in Appellee's Brief.

On the other hand, Appellee's Brief contains many partial quotations which appear to support the "no-cure" statute.

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[13] See footnote 17, infra.

The Appellee's Brief at page 6 quotes at length a Note in the Columbia Law Review, the incomplete quoted portion of which at first blush would appear to support the Appellee's argument that the Mississippi "no-cure" statute is a recommended tool for implementing state policy in connection with the imposition of qualification requirements. See Appellee's Brief, page 6, citing *Note, Sanctions for Failure to Comply with Corporate Qualification Statutes: An Evaluation*, 63 Colum. L. Rev. 117, 122-23 (1963). However, Appellee omits the conclusion of the Columbia Law Review Note which condemns the use of a statute such as that in effect in Mississippi:

> "Although denial of Court use is essentially a valuable device, specific provisions frequently contain imperfections....if qualification will not enable the corporation to sue on antecedent obligations, the sanction may be unduly severe, since the corporation may forfeit unreasonable sums while the parties with whom the corporation has dealt receive unjustifiable windfalls. On balance, the former approach [of allowing subsequent qualification to cure prior defects] must be preferred because it provides effective enforcement and yet is fair to the corporation. The need for deterrents can be met by a companion provision imposing monetary penalties."

In fact, not a single commentator cited in the Appellee's Brief champions the use of a "no-cure" statute which absolutely prohibits suits on antecedent contracts in order to enforce qualification requirements. The prior decisions of the U.S. Supreme Court, and the commentators, exhibit an abhorrence of such statutes. In *Sioux Remedy Co. vs. Cope*, 235 U.S. 197, 205 (1914), the Supreme Court unanimously struck down the application of a South Dakota law which prevented suit on a contract made antecedent to qualification. The Court stated:

> "We think the mere statement of the conditions [of the state's qualification statute] shows that they have no natural or reasonable relation to the right to sue which they are intended to restrict. They have no bearing upon the merits or any question of procedure or costs, are not directed against any abusive use of judicial process, and are plainly onerous."

In *Dahnke Walker Milling Co. vs. Bondurant*, 257 U.S. 282 (1921), the Court was presented with a similar "no-cure" statute which would have prohibited enforcement of antecedent contracts, and the Court refused to apply the state statute.

In contrast, in *Union Brokerage Co. vs. Jensen*, 322 U.S. 202, 211 (1944), the Court upheld imposition of a no-suit penalty for failure to qualify where defects could be cured and suit could be maintained after qualification. The Court emphasized the non-discriminatory general application of the Minnesota qualification statute. The Minnesota statute under consideration in *Union Brokerage* had a "subsequent compliance" no suit sanction, and the Court in *Union Brokerage* distinguished the Minnesota statute from the South Dakota statute which was held not applicable to a corporation in interstate commerce in *Sioux Remedy Co. vs. Cope*, supra. Likewise, in *Eli Lilly & Co. vs. Sav-on-Drugs, Inc.*, 366 U.S. 276 (1961), the New Jersey qualification statute which was allowed to stand had a "subsequent compliance" no-suit sanction.

The commentators have recognized that forever barring suit on antecedent contracts is a punishment far out of proportion to the harm done by failing to qualify; as a survey of the authorities cited in the Appellee's Brief shows.

The Note, *The Legal Consequence of Failure to Comply with Domestication Statutes*, 110 U. Pa. L. Rev. 241, 257,

266 (1961), a part of which is cited in apparent support of the Appellee's argument at pages 7 and 8 of Appellee's Brief, does *not* conclude that the Mississippi type statute is a desirable instrument of state policy. That Note states:

> "...the protection of local interests hardly seems to require the total nullification of agreements consciously undertaken. If the concept of nullification were taken seriously, an otherwise innocent foreign corporation could as well be swindled by an angling domiciliary, as vice versa...
>
> "***where the statute declared that no suit could be maintained on contracts made by a non-complying foreign corporation, the same result [as in the statutes declaring contracts null] obtained." [14]

The Comment, *The Lilly Case: Dictum, Holding and Finding*, 57 N.W. U.L. Rev. 306, 322 (1962) cited at Appellee's Brief pp. 26, 38, comes to this conclusion:

> "...severe monetary penalties and closing the Courts to the corporation as Plaintiff are extreme methods considering the limited interests served. In addition, the no-suit sanction is questionable since positive action by the state can now be taken against the corporation doing business, and it must be so doing business to be within the qualification statute. Positive sanctions of fine or injunction would avoid a windfall to the Defendant and provide a reasonable method of enforcing qualification to serve the convenience of the citizens of the state."

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[14] The quoted Note criticizes the injustice of declaring contracts void, and points out that "no-cure" statutes have the same effect. It does point out, in the portion quoted in Appellee's Brief at pp. 7-8, that

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The Comment, *Foreign Corporations - State Boundaries for National Business* 59 Yale L.J. 735, (1950) cited in Appellee's Brief at page 26 reaches the following conclusion adverse to Appellee's position:

> "Whatever its value as a punitive device, this penalty [barring enforcement of an otherwise valid agreement even though there is qualification while the litigation is pending] does not serve to rectify the harm done by non-registration. The state's interest in registration lies in the receipt of taxes and the protection of its citizens against irresponsible acts. To deny a non-complying firm the right to enforce its agreements does not satisfy either of these interests, but instead confers a windfall on the person against whom the claim would be outstanding. Even considered as a deterrent rather than a remedial expedient, unenforceability of contracts is a crude and erratic punishment."

The Note, *Foreign Corporations: The Interrelation of Jurisdiction and Qualification*, 33 Ind. L.J. 358, 376 (1958) concludes:

> "....insofar as qualification sought jurisdiction through actual consent and sought to induce compliance by a negative, self-enforcing, no-suit sanction, the present rules and the results thereunder are without reason. A noncomplying foreign corporation is denied access to the Courts through the application of a no-suit sanction on the ground that by its failure to qualify it has not made itself available to the local forum. But

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allowing curability is not as effective a punishment for failure to qualify as barring cure. But it does not recommend "no-cure". Instead, it recommends that a bonus be paid to litigants who uncover unqualified foreign corporations. Note, **The Legal Consequences of Failure to Comply with Domestication Statutes,** 110 U. Pa. L. Rev. 241, at 268 (1961).

in truth, if the state or a private party plaintiff sought to bring an action against the corporation, jurisdiction could be had. This is especially evident in those cases where the corporation is barred from suit only after engaging in activity in quantum equal to or greater than the prevailing standard needed for the acquisition of personal jurisdiction. The result is that defendants to actions brought by corporate plaintiffs are often relieved of their just obligations, a result that should be permitted only if necessary to serve a greater public interest. Such justification is lacking now and perhaps always has been."

Similar criticism of the Mississippi type statute is found in Note, *Right of a Foreign Corporation to Sue Upon Contracts in Montana Courts - Doing Business - Failure to Qualify - Subsequent Qualification*, 36 Mont. L. Rev. 218 (1965), (cited in Appellee's Brief at pp. 7-8).

In *Woods vs. Interstate Realty Company*, 337 U.S. 535, 539-40 (1949), the Court held, on *Erie* principles, that the Mississippi "no-cure" statute was substantive law of the state which must be applied by a federal court sitting in a diversity case. Mr. Justice Jackson, in a stinging dissent, issued a strong criticism of the merits of the Mississippi "no-cure" law: "Absolute prohibition of access to the Courts as a penalty for failure to qualify is a 'harsh, capricious and vindictive measure'*** ... the amount of this punishment bears no relation to the amount of wrong done to the State in failure to qualify and pay its taxes. The penalty thus suffered does not go to the State, which has sustained the injury, but results in unjust enrichment of the debtor..."

In the instant case, unlike *Woods vs. Interstate Realty Co.*, *Eli Lilly and Company, Inc. vs. Sav-on-Drugs, Inc.*, and *Union Brokerage Co. vs. Jensen*, the Court is presented

directly with the question whether the "no-cure" statute is to be a constitutionally approved instrument of state policy, or whether its application to contracts made by interstate businesses is in conflict with the policies of the Commerce Clause. The Court cannot affirm the decision below without validating the Mississippi "no-cure" statute and the unjust and disruptive effect the statute will have on the cotton industry, and on existing contracts in other industries.

In weighing the competing interest of federal free trade policy against the interest of the state in prohibiting enforcement of contracts made without qualification, what is the justification for the application of the Mississippi law? According to Pittman the requirement of qualification is necessary to solicit information which is in turn necessary to assist the State of Mississippi in its taxing program. Presumably, the harsh "no-cure" statute also is justified by the state interest in taxation.

However, as pointed out above, the State of Mississippi does not impose a tax on Allenberg in this situation. It would be a startling anomaly to justify the "no-cure" penalty statute, which has been condemned by so many commentators and by prior decisions of this Court, on the basis of the Mississippi interest in taxation when no tax is in fact imposed.

Mr. Justice Jackson stated: "...the amount of this punishment bears no relation to the amount of wrong done to the State in failure to qualify and pay its taxes." *Woods vs. Interstate Realty Co.*, 337 U.S. 535, 539-40 (1949). That statement is doubly true in the instant case because no wrong has been done to Mississippi by Allenberg's failure to qualify, because no taxes were imposed.

The "no-cure" statute will cause incalculable financial hardship in the numerous pending suits in Mississippi,

Alabama and Arkansas on 1973 cotton contracts if its use is upheld by this Court. The ramifications of such a ruling would be staggering. The 1973 forward contracts to purchase cotton were only one link in the distribution process which is worldwide. Over half of the United States 1973 cotton crop was resold by cotton merchants to foreign purchasers. If contracts with the initial source of supply (farmers in Mississippi, Alabama and Arkansas) cannot be enforced, the financial viability of a significant portion of the nation's cotton industry will be jeopardized.

If this Court expands state power to require corporations like Allenberg to qualify in all states where contracts to purchase are made, and together with such a ruling it approves the "no-cure" statute, it will create a legal precedent which can be used in the states presently having "no-cure" statutes, by all persons who find it to their current advantage to breach existing contracts affected by the ruling. The tragic hardships imposed upon the cotton industry in 1973 by the ruling of the Mississippi Supreme Court in this case will be felt by innocent contracting parties in other industries. Who those parties will be, or what industries will be affected, cannot be predicted by counsel for Allenberg. However, it is known that those hardships will be felt in the cotton industry in the three important cotton producing states of Mississippi, Arkansas and Alabama. At the present time a great number of 1973 forward contracts to purchase cotton are still in litigation in those three states. Despite the great number of suits filed after the 1973 price rise in cotton, only one Court has held that making those forward purchase contracts required local qualification: the Mississippi Supreme Court in the instant case.

As previously pointed out, the United States district courts in the States of Mississippi and Alabama have held

that the 1973 forward contracts were made in interstate commerce, e.g. *Cone Mills Corp. v. Hurdle*, 369 F. Supp. 426 (N.D. Miss. 1974); *Reigel Fiber Corp. v. Ellis Brothers*, N.D. Ala., No. 73P-954 (1974). If this Court were to reverse decisions so holding, and were to hold not only that qualification was required, but also that the "no-cure" statute is not an unconstitutional burden on interstate commerce, a significant portion of the nation's cotton industry would be dealt a staggering blow. Yet such a ruling would not increase the tax revenues of the State of Mississippi. Nor would such a ruling assist citizens of Mississippi to obtain jurisdiction over foreign corporations they could not presently reach by service under the long arm statute. The only persons benefited by such a ruling would be those cotton producers who willfully and solely for personal gain, repudiated their forward contracts for the sale of cotton—to the comparative financial detriment of their neighbors who honorably lived up to their contractual commitments and performed their contracts in 1973 despite the price rise.

Considerations such as these have led the commentators cited above to condemn the use of the "no-cure" statutes. For similar reasons forty-four states[15] have eschewed the use of "no-cure" statutes. For such reasons the Supreme Court has refused to apply "no-cure" statutes in *Dahnke Walker Milling Co. vs. Bondurant*, 257 U.S. 282 (1921), *International Textbook vs. Pigg*, 217 U.S. 91

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15 Appellant's Brief, at 105, cites a study [C.T. Corporation, **What Constitutes Doing Business** (1973) p. 3] which listed five states (Alabama, Arizona, Arkansas, Mississippi and Vermont) in which the statutory bar to enforcement of contracts by a non-qualified foreign corporation could not be removed by subsequent qualification. Montana is the sixth state where this result obtains. Note, **Right of a Foreign Corporation to Sue upon Contracts in Montana Courts - Doing Business - Failure to Qualify - Subsequent Qualification**, 26 Mont. L. Rev. 218 (1965).

(1910), and *Sioux Remedy Co. vs. Cope*, 235 U.S. 197 (1914), while in contrast the Court has upheld the imposition of qualification requirements by states having "subsequent compliance" statutes in *Union Brokerage Co. vs. Jensen*, 332 U.S. 202 (1944),[16] and *Eli Lilly and Co., Inc. vs. Sav-on-Drugs, Inc.*, 366 U.S. 276 (1961).

Pittman has pointed out that Allenberg Cotton Company, Inc. has qualified to do business in Mississippi while this appeal is pending. Motion to Dismiss or Affirm, page B-12. If this Court should hold that Allenberg should have qualified to do business in Mississippi, it should couple that conclusion with a holding that the Mississippi "no-cure" statute is a burden on interstate commerce which goes beyond that necessary to promote the local interest involved. *Pike vs. Bruce Church*, 397 U.S. 137 (1970). It should strike down the "no-cure" statute as applied to Allenberg, and hold that Allenberg, having qualified while this litigation is pending, may now obtain legal redress in the courts of Mississippi, and it should remand the case for entry of judgment against Pittman. Similar procedures have been followed in states having "subsequent compliance" statutes. See for example, *J. R. Watkins Co. vs. Floyd*, 119 So. 2d 164 (La. 1960); *Inn Operations, Inc. vs. River Hill Motor Inn Company*, 152 N.W. 2d 808 (Iowa 1967) (under Model Bus. Corp. Act).

The foregoing discussion speaks to the adverse effects on existing trade relationships of a dual ruling requiring qualification and approving the "no-cure" statute. Even less compelling reasons led the Court to decline to disturb older precedents in *Flood vs. Kuhn*, 407 U.S. 258 (1972).

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[16] Pittman has claimed that "there are no significant differences between the Mississippi Code and those provisions at issue in **Union Brokerage vs. Jensen**, 322 U.S. 202 (1944)." Brief of Appellee, p. 37. This statement is not correct. The statute in **Union Brokerage** was a "subsequent compliance" statute, it was not a "no-cure" statute.

The devasting effect on existing contracts is not disputed by Appellee in his Brief. Nor does Appellee's Brief contravert the adverse prospective effect on composition which Allenberg has pointed out would result from an affirmance of the decision below. See Brief of Appellant, pages 95-98. If the ruling proposed by Pittman were adopted by this Court as the law of the land, ***no rational prospective buyer of goods for interstate shipment would ever submit an offer to purchase goods in a state where it had not previously qualified to do business if that state had a "no-cure" statute.***[17] As a result, buyers would conduct activities only in previously established areas of interest. A substantial barrier to potential entry into markets of tangential interest would have been raised.[18]

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[17] Under the ruling of the Mississippi court, if an offer to buy were submitted without prior qualification, upon acceptance a contract would exist which could be enforced against the buyer, but which could be repudiated at will by the seller. Thus no rational buyer would even bid in Mississippi without prior qualification, in fear of bidding successfully.

Pittman claims, at Appellee's Brief p. 45, that Mississippi "extends an invitation for foreign corporations to do all the business they desire without qualifying and it is only: (1) at the point where a contract is breached; and (2) no other alternative exists for enforcement except utilization of the state's court system, that a penalty comes into play." This ignores reality. Mississippi requires qualification prior to the time a cause of action accrues. **Parker v. Lin-Co Producing Company**, 167 So. 2d 228 (Miss. 1967); **Opinion of the Mississippi Supreme Court**, reprinted in Jurisdictional Statement, at p. A-6. An unqualified corporation entering a contract in Mississippi does so in peril of having the contract repudiated without legal recourse from the instant the contract is effective until qualification has been accomplished. In this situation no contract would be made until after qualification.

[18] The anti-competitive effect of such a result is obvious. For the same or similar reasons the great majority of state courts have avoided decisions which could discourage potential competition. They have used varying devices to avoid that result. One widespread device has been to hold that **merely entering into** or making a contract to do business in a state is not "doing business" there, even if the contract contemplates performance in the state which would be of sufficient local importance to require qualification. Thus, **Fletcher, Cyclopedia of Corporations**, Vol. 17, Section 4868,

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This Court has emphasized the relevance of alternatives in its analysis in similar cases. The existence of alternatives which are less intrusive to the federal interstate

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pages 561-62 states as a general rule the proposition that entering a contract is an act "preliminary" to doing business. In the same section, at footnote 76, Fletcher quotes at length an explanation of the reason for this rule by the Missouri Supreme Court:

> "Now, when our statutes say that a foreign corporation shall not 'transact business' here until it establishes a public office in this state, where books are kept and process may be served, and until it pays its quasi incorporation tax, and takes out its license, do they mean that the corporation must do all those acts before it can lawfully enter into a contract to do any business here? Does our law mean that, when advertisements inviting bids on public and private works in this state are read by foreign corporation, they are to understand that they have not the right to bid and have their bids accepted unless they shall have already complied with the terms of our statute to enable them to transact business here? No; that is not the meaning of our statutes. No such policy of exclusion has ever been shown in any of our legislative acts. Foreign corporations have always been invited and encouraged to come. The obtaining of a desirable contract is sometimes an inducement for a foreign corporation to come into the state. It is not bound to establish itself here before it can obtain such a contract. Entering into a contract like the one in question undoubtedly is 'transacting business', within the unlimited meaning of the term, but that is not the sense in which the term is used in the statute just quoted. As there used, it means carrying on the work for which the corporation was organized, and, in its application to the facts of this case, it means performing the work called for by the contract. The Kern Company, under the conditions stated in the petition, had the right to enter into the contract in question, and we hold it to be a legal and valid contract." **Hogan vs. St. Louis**, 176 Mo. 149, 75 S.W. 604. (At the time of **Hogan**, Missouri had a "no-cure" statute.)

The Restatement Second, Conflict of Laws, §311, also recognizes that a qualification rule which would discourage potential entry into the state should not be adopted. Section 311, Comment g, explains: "An agreement made in a state to do business there in the future does not amount to the doing of business [so to require qualification]."

This Court could, if it chose, separate the storage of the cotton after performance of Pittman's contract, from the activities at issue here. **Eli Lilly & Co. vs. Sav-on-Drugs, Inc.**, 366 U.S. 276, 282-83 (1961).

The activity of Allenberg which Pittman argues constitutes doing business in Mississippi is having title to cotton in a compress and warehouse between

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commerce interest must be considered in determining whether application of a state statute will be held unduly burdensome under the Commerce Clause. ***Pike vs. Bruce Church***, 397 U.S. 137, 142 (1970); ***Dean Milk Co. vs. Madison***, 340 U.S. 349, 354 (1951). Only six states have failed to provide curative provisions in no-suit penalties for failure to qualify. In this case Mississippi fails to allow cure despite good faith reliance on prior law and despite the fact that failure to qualify has neither prejudiced Pittman nor harmed the state. This harsh "no-cure" sanction is an alternative which the Court should hold is not available to the State.

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the time the documents are received in Tennessee and shipping orders are given. Even if this contention is accepted, the activity of Allenberg so far does not constitute doing intrastate business in Mississippi, and Mississippi's refusal to allow Allenberg to conduct its activity to date is an undue burden on interstate commerce.

It is widely recognized that merely bringing suit is not "doing business" so as to require qualification. **Fletcher, Cyclopedia of Corporations** §8471; Model Business Corp. Act, §99. Since neither entering into the instant contract nor bringing suit upon it is doing intrastate business in Mississippi, this Court should hold that Mississippi cannot require local qualification by Allenberg to conduct those activities; even if acts subsequent to these (such as having title to cotton in a warehouse before shipping orders are issued) may require qualification. Such a holding could be effectuated by reversing the decision below insofar as it denied Allenberg access to the courts of Mississippi, and remanding the case to Mississippi. If this Court concludes that obtaining performance of the contract would constitute "doing business" in Mississippi it could allow Mississippi to adopt a rule which would prohibit Allenberg from obtaining performance of the contract (or the equivalent of performance — obtaining a judgment) until it qualified to do business in Mississippi. Since Allenberg is now qualified to do business in Mississippi, under such a rule of law it would now be entitled to obtain judgment against Pittman, and the Mississippi Supreme Court should be instructed to enter judgment against Pittman in this case.

This is one manner in which the anti-competitive effect of the "no-cure" statute could be mitigated.

CONCLUSION

"Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the nation..." *H. P. Hood and Sons, Inc., vs. DuMond*, 336 U.S. 525, 539 (1949).

The Commerce Clause grants Allenberg free access to Mississippi markets to buy cotton there and ship it from the state. Under neither a mechanical analysis nor a balancing analysis is Allenberg required to qualify in Mississippi to purchase cotton there and ship it from the state. Imposition of qualification requirements in this case (whether rationalized by the state's hypothetical taxing interest, or otherwise), is in conflict with the principle that "our economic unit is the Nation," [336 U.S. 539] and the policy of free market access. The Federalist No. 11, at 52 (Cooke ed. 1961).

The agricultural merchandising system of our nation as it exists today is a realization of the goal of the founding fathers. The decision of the Mississippi Supreme Court in this case is a direct challenge to that goal.

For these reasons, the decision below should be reversed.

Respectfully submitted,

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